

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
JEFFERSON RIVER BASIN (41G)
PRELIMINARY DECREE

CLAIMANTS: Thomas J. Kelly; William W. Kelly; James
J. McGarvey

CASE 41G-0499-R-2022
41G 95714-00

OBJECTOR: United States of America (USDA Forest
Service)

REQUIRED PARTY: Montana Department of Fish,
Wildlife and Parks

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
FINDINGS OF FACT

1. Claim 41G 95714-00 is a mining claim from springs on an unnamed tributary of Homestake Creek with a 1966 priority date. This Case was consolidated to address the United States Forest Service Objection to claim 41G 95714-00 and the issue remark appearing on the claim concerning the means of diversion.

2. On September 27, 2023, Claimant William Kelly, through the executor of his estate, Teri Woog, filed a Motion to Amend claim 41G 95714-00. (Doc.¹ 14.00). In the Motion, Woog acknowledged that the claim had been previously adjudicated and was subject to the terms of a Stipulation entered into with the Montana Department of Fish, Wildlife and Parks (DFWP).

3. Claim 41G 95714-00 was subject to previous water court proceedings in 1992 in Case 41G-85. During those proceedings, DFWP filed an objection to claim 41G 95714-00. The objection was resolved through a Stipulation between the claimants and DFWP. The Stipulation stated, “the Claimants further agree that they will not attempt to amend [the claim] in subsequent Water Court proceedings without giving notice to DFWP....”

DFWP was added to the Service List and indicated that it did not consent to the proposed amendments. Accordingly, DFWP was joined as a required party.

4. On March 1, 2024, Claimant filed a Second Verified Motion to Amend. (Doc. 26). Attached to the Second Motion to Amend is a statement from DFWP indicating that it does not oppose the Motion’s proposed amendments. (Doc. 26, Ex H). Also on March 1, 2024, the United States filed a statement indicating that the amendments specified in the Second Motion to Amend would resolve the United States’ objections to claim 41G 95714-00. (Doc. 27).

5. The Second Motion to Amend claim 41G 95714-00 requests corrections to the ownership information; refinement of the legal land description for the point of

¹ “Doc.” numerical references correlate to case file docket numbers in the Water Court’s Full Court case management system.

diversion and place of use; modification of the means of diversion; and addition of an information remark stating the use of the water is nonconsumptive.

6. Ownership: Claim 41G 95714-00 appeared in the 41G Preliminary Decree with the following individuals listed as owners of the claim: James J McGarvey, Thomas J Kelly, and William W Kelly.

Attached to the Second Motion to Amend is a Bill of Sale dated August 14, 2012 documenting the sale of James McGarvey's one third interest in the mining claim to William Kelly. (Doc. 26, Ex B). Also attached is a Bill of Sale dated August 16, 2013 documenting the sale of Tom Kelly's one third interest in the mining claim to William Kelly. (Doc. 26, Ex C). Accordingly, by the time claim 41G 95714-00 was decreed in the 41G Preliminary Decree, it was owned in full by William Kelly, but the ownership information listed on the claim was not updated.

Terri Woog, Personal Representative for William Kelly, indicates that all three identified owners are now deceased. The ownership information for claim 41G 95714-00 should be updated to identify William Kelly, c/o Terri Woog, as the sole owner.

7. Place of Use and Point of Diversion Legal Land Description: The Place of Use and Point of Diversion for claim 41G 95714-00 was listed in the Preliminary Decree as being located in the NWSESW of Section 7, T2N, R6W.

The claimant explains that Section 7, T2N, R6W is unusual in that it only consists of 507 acres rather than the typical 640 acres. This has resulted in inaccuracies and confusion in the legal land description for the place of use and point of diversion for claim 41G 95714-00. Section 7 is mostly divided into government lots rather than aliquot parts. Accordingly, the legal land description for the place of use and point of diversion is most accurately described as being in Government Lot 1 in Section 7, T2N, R6W. The place of use and point of diversion should be corrected accordingly.

8. Means of Diversion: The statement of claim for 41G 95714-00 identified several diversion means, resulting in the claim being decreed as having "multiple" diversion means. The claimant indicates that in reality, the means of diversion is a movable pump that is put into the source (one of three springs) to divert water for mining.

Accordingly, the claimant requests that means of diversion be identified as “moveable pump.” However, due to database restrictions, the means of diversion will be modified to “pump” and an information remark will be added to the abstract stating “pump is moveable.”

The issue remark appearing on claim 41G 95714-00 states:
THE CLAIMED MEANS OF DIVERSION CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

The claimant’s description of how water has historically been diverted explains why a means of diversion could not be identified. A movable pump would not necessarily be able to be identified from the data available to the DNRC. The issue remark has been resolved and should be removed from the claim abstract.

9. Information Remark: The claimant requests the addition of an information remark stating, “THE USE OF THIS WATER RIGHT IS NONCONSUMPTIVE.” The requested information remark is a common remark that is added to claims that do not constitute a consumptive use of water. In effect, the remark limits how the water can be used and can be accepted without further presentation of evidence. The information remark should be added to claim 41G 95714-00.

CONCLUSIONS OF LAW

1. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. § 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 the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R. The Claimant has provided sufficient evidence to overcome the prima facie status of claim 41G 95714-00 with respect to the ownership, place of use and point of diversion legal land description, and the means of diversion.

2. Section 85-2-248(2), MCA requires the Water Court to resolve all issue remarks that are not resolved through the objection process. 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. § 85-2-248(3), MCA. The issue remark

appearing on claim 41G 95714-00 has been resolved by the information provided by the Claimant.

3. If a claimant agrees to reduce or limit an element of a claim, the water court may accept the claimant's requested reduction or limitation without further presentation of evidence. Rule 17(c), W.R.Adj.R. The requested addition of the information remark noting that the use of the claim 41G 95714-00 is nonconsumptive is a limitation and therefore may be accepted without further presentation of evidence.

RECOMMENDATION

1. The claimant's motion to amend claim 41G 95714-00 should be accepted by the court.

2. The issue remark appearing on claim 41G 95714-00 should be removed.

A Post Decree Abstracts of Water Right Claim is served with the Report to confirm that the recommended modifications have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
JEFFERSON RIVER
BASIN 41G**

Water Right Number: 41G 95714-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: WILLIAM W KELLY
% TERI WOOG
3120 MCMASTERS RD
BILLINGS, MT 59101

Priority Date: AUGUST 19, 1966

Type of Historical Right: FILED

Purpose (Use): MINING

Flow Rate: 89.76 GPM

Volume: THIS WATER RIGHT IS LIMITED TO THE VOLUME OF WATER HISTORICALLY USED FOR MINING PURPOSES.

Source Name: UNNAMED TRIBUTARY OF HOMESTAKE 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	1		7	2N	6W	JEFFERSON

Period of Diversion: MARCH 1 TO NOVEMBER 1

Diversion Means: PUMP
PUMP IS MOVEABLE

Period of Use: MARCH 1 TO NOVEMBER 1

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		1		7	2N	6W	JEFFERSON

Remarks:

THE USE OF THIS WATER RIGHT IS NONCONSUMPTIVE.