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FILED

JUN 04 2020

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
YELLOWSTONE DIVISION  
BEAVER CREEK TRIBUTARY OF LITTLE MISSOURI RIVER - BASIN 39G  
PRELIMINARY DECREE

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CLAIMANT: D & F Chaffee Ranch Inc.

**CASE 39G-R2**  
39G 3260-00  
39G 3261-00  
**Implied Claim:**  
**39G 30146971**

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Clerk of the Montana Water Court. Please review this report carefully.

You may file a written objection to this Master's Report if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations.

Rule 23 of the Water Right Adjudication Rules requires that written objections to the Master's Report must be filed within **10 days** of the date of the report. If the 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. The above stamped date indicates the date the Master's Report was filed and mailed.

If you file an objection, you must mail 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**

Claims 39G 3260-00 and 39G 3261-00, owned by D & F Chaffee Inc., appeared in the Preliminary Decree for Beaver Creek, Tributary to Little Missouri River (Basin 39G)

with issue remarks from the Montana Department of Natural Resources and Conservation (DNRC) preparation of the preliminary decree. The Water Court consolidated the claims into Water Court case 39G-R2 to resolve the issue remarks.

#### FINDINGS OF FACT

1. Pursuant to § 85-2-248(5), MCA, the Water Court directed D & F Chaffee Inc. to work with DNRC to resolve the issue remarks appearing on the claims. DNRC filed a Memorandum with the court, including its recommendations to resolve the issue remarks.

2. Claim 39G 3260-00 is a stock use right for surface water direct from Hay Creek in Wibaux County, Montana. An issue remark appearing on the claim's preliminary decree abstract states that the claim appears to be claiming two separate sources of water. A source-name information remark on the claim indicates that stock additionally drink from a spring hydrologically related to the source.

3. The record indicates that Jacob Germann filed the original statement of claim for claim 39G 3260-00 on May 26, 1980, claiming two sources of water with two distinct priority dates: (1) Hay Creek first used for stock-watering in 1925; and (2) a spring developed and first used for stock-watering in 1955. Germann's filed Declaration of Vested Groundwater Rights further confirms that Germann developed and began using the spring on October 15, 1955.

4. DNRC's Memorandum indicates that DNRC spoke with D & F Chaffee Inc. and explained that separate sources of water require separate water rights. D & F Chaffee Inc. inspected the property and confirmed that stock continue to drink from both the spring and Hay Creek, consistent with historical use. Based on its discussions with D & F Chaffee Inc. and its review of the historical record, DNRC recommended the Water Court to generate an implied stock-use claim with an October 15, 1955 priority date to resolve the issue remark. DNRC included a map depicting the following location of the developed spring (Map A):

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SW	28	15N	60E	WIBAUX

5. Claim 39G 3261-00 is a stock-use right for surface water from an unnamed

tributary of Hay Creek. The claim received a notice-type issue remark indicating that DNRC modified the claim's means of diversion pursuant to its preparation of the preliminary decree.

### PRINCIPLES OF LAW

1. "The Montana [W]ater [C]ourt has a statutory obligation and the exclusive authority to adjudicate claims of existing water rights." Rule 1(a), W.R.Adj.R.

2. A properly filed statement of claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R. A preponderance of the evidence is evidence that shows a fact is "more probable than not." *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628. The party seeking to overcome the prima facie status of a statement of claim, including a claimant objecting to his or her own claim, bears the burden of proof. *Nelson v. Brooks*, 2014 MT 120, ¶¶ 34, 37, 375 Mont. 86, 329 P.3d 558.

3. Section 85-2-248(2), MCA, requires the [W]to resolve all issue remarks 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. Section 85-2-248(3), MCA. In an informal effort to resolve issue remarks, the Water Court has authority pursuant to § 85-2-258(5)(a), MCA, to require DNRC and claimants to prepare and file documents with the court, including recommendations for issue remark resolution. The Water Court may use information submitted by the DNRC, the statement of claim, and any other data obtained by the court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

4. When resolving issue remarks, the Water Court weighs the information resulting in the issue remark, the issue remark, and additional information obtained from DNRC, against the claimed water right. Section 85-2-247(2), MCA. The basis for the issue remark must meet the preponderance of the evidence standard before the prima facie status of a claim is overcome.

5. An implied claim is "a claim authorized by the Water Court to be separated and individually identified when a statement of claim includes multiple rights." Rule

2(a)(33), W.R.C.E.R. The Water Court recognizes implied claims where a claimant can prove that: (1) the claimant's original statement of claim and attached documentation indicate the existence of two or more water rights; (2) historic use corroborates the implied claim; and (3) the court's recognition of the implied claim will not alter historic water use or increase the historic burden to other water users. *Claimants: Lee E. Foss*, 2013 Mont. Water LEXIS 17, \*32; *In re Tucker*, 2019 Mont. Water LEXIS 59, \*2-3. The Water Court requires claimants to meet this three-pronged test to ensure that claimants are not circumventing Montana's forfeiture statutes or seeking to unlawfully enlarge the elements of their claim. *In re Adjudication of the Existing Rights to the Use of All the Water*, 2004 Mont. Water LEXIS 2, \*4-7.

6. In considering whether recognition of an implied right is appropriate, the Water Court's findings must be supported by substantial evidence, meaning "evidence a reasonable person might find adequate to support a conclusion, even if the evidence is weak or conflicting." *Claimants: Lee E. Foss*, 2013 Mont. Water LEXIS 17, \*2 (internal citations omitted). The evidentiary standard is "more than a scintilla but less than a preponderance." *Claimants: Lee E. Foss*, 2013 Mont. Water LEXIS 17, \*2.

#### CONCLUSIONS OF LAW

1. The evidence in the record is sufficient to resolve the issue remarks appearing on the claims' preliminary decree abstracts.

2. Evidence in the record indicates it is more probable than not that stock-use claim 39G 3260-00 has two separate sources, water direct from Hay Creek and water from a developed spring, requiring two water rights. Consistent with DNRC's recommendation, the Water Court concludes that generation of an implied claim for stock-watering from the developed spring with an October 15, 1955 priority date is appropriate, meets the test established in *Foss*, and resolves the issue remark appearing on claim 39G 3260-00. DNRC and D & F Chaffee Inc. sufficiently proved: (1) that the original statement of claim filed by Germann indicates the use of two sources, requiring two water rights; (2) that historic and current use corroborates that stock drank and have continued to drink water directly from the developed spring; and finally, (3) that the court's generation of an implied claim for stock-watering direct from the developed spring will not alter historic water use or

increase the historic burden to other water users. *See Claimants: Lee E. Foss*, 2013 Mont. Water LEXIS 17, \*2.

3. Accordingly, the Water Court generates implied claim 39G 30146971 (child claim) from claim 39G 3260-00 (parent claim) with an October 15, 1955 priority date for surface water direct from a spring hydrologically related to source. The point of diversion and place of use for claim 39G 30146971 is the spring located at:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SW	28	15N	60E	WIBAUX

The points of diversion and places of use regarding stock drinking direct from Hay Creek shall be removed from implied claim 39G 30146971. The multiple sources issue remark appearing on claim 39G 3260-00 is therefore resolved and shall be removed from the claim.

4. The notice-type issue remark indicating that DNRC modified the means of diversion on claim 39G 3261-00 served its notice purpose and shall be removed.

#### RECOMMENDATIONS

Based on the above findings of fact and conclusions of law, this Master recommends that the court adopt the changes as outlined above. Post-decree abstracts of the water rights claims and Map A are attached to this Master's Report.

DATED this 4<sup>th</sup> day of June, 2020.

  
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Kirsia Shelkey  
Water Master

#### Service via USPS Mail:

D & F Chaffee Ranch Inc.  
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Wibaux, MT 59353

**Note: Caption Updated 3-11-20**