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FILED
JUN 22 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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CLAIMANTS: James L. Brophy; Maureen H. Brophy	**39G-R31** 39G 121794-00

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, Conclusions of Law, or Recommendations. The above stamped date indicates the date this Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules requires written objections to a Master's Report be filed within 10 days of the date of the Master's Report. Because this Master's Report was mailed to you, Rule 6(d) of the Montana Rules of Civil Procedure provides an additional 3 days to the 10-day objection period.

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 this 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

Claim 39G 121794-00, owned by James Brophy and Maureen Brophy, appeared in the Preliminary Decree for Beaver Creek, Tributary to Little Missouri River (Basin 39G) issued on December 19, 2018. The claim did not receive objections but did receive an issue remark. Issue remarks are notations identifying potential legal or factual issues with your water rights and are placed on claims by the Department of Natural Resources and Conservation (DNRC) during preparation of the Preliminary Decree. The claim was consolidated into Case 39G-R31 for the purpose of resolving this issue remark.

FINDINGS OF FACT

1. Claim 39G 121794-00 is a water spreading irrigation claim that was decreed in the Basin 39G Preliminary Decree with the following point of diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1		NWNWNW	6	13N	60E	Wibaux

2. The DNRC placed the following issue remark on the claim during its review in preparation of the Basin 39G Preliminary Decree:

> THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE DIKE CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

3. The DNRC also placed the following note in the claim file:

> It is unclear how the 70 acres gets irrigated from the claimed point of diversion. Unable to locate where the POD dike crosses the source, as the land has many dikes & claimed POD appears to be lower in elevation than the rest of the claimed place of use.

4. The DNRC did not provide information as to what material it relied upon in examining this claim and placing the issue remark on the claim.

5. This type of information is particularly necessary where, as here, the water right is for water spreading, which may occur sporadically and not be visible in certain aerial photographs.

6. On April 6, 2020, this Court ordered Claimants to file information regarding the historical point of diversion with the Court if they believed the point of diversion was incorrect as it appeared in the Preliminary Decree.

7. The Court informed Claimants that if nothing was filed with the Court, the point of diversion would remain as decreed in the Preliminary Decree and the issue remark would be removed.

8. Nothing was filed with the Court by the deadline.

PRINCIPLES OF LAW

1. A properly filed claim of an existing right or an amended claim of existing right is prima facie proof of its content. § 85-2-227, MCA.

2. 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.

3. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

4. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. § 85-2-247(2), MCA. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

CONCLUSIONS OF LAW

1. The point of diversion issue remark, and the information upon which the issue remark is based, fail to overcome the prima facie status of the Statement of Claim. The issue remark should be removed from the claim.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes outlined above.

A post-decree abstract of the water right claim reflecting the recommended changes is attached to this Report.

DATED this 22nd day of June, 2020.

Eyvind Ostrem
Water Master

Service via USPS Mail
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