

Montana Water Court
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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

* * * * *

CLAIMANTS: Bernice K. Kreitinger; Stephen F. Kreitinger

39G-R47
39G 20260-00
39G 20261-00
39G 115408-00

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

Claims 39G 20260-00, 39G 20261-00, and 39G 115408-00 appeared in the Preliminary Decree for Beaver Creek, Tributary to Little Missouri River (Basin 39G) issued on December 19, 2018. The claims did not receive objections, counterobjections, or notices of intent to appear, but did receive issue remarks. Issue remarks are notations identifying potential legal or factual issues with water rights and are placed on claims by the Department of Natural Resources and Conservation (DNRC) during preparation of the Preliminary Decree. These claims were consolidated into Case 39G-R32 to resolve the issue remarks.

FINDINGS OF FACT

1. Claims 39G 20260-00 and 39G 20261-00 are flood irrigation claims that each received the following issue remark:

THE TYPE OF IRRIGATION SYSTEM APPEARS TO BE WATER SPREADING.

2. The affidavits attached to claim 39G 20260-00 and the Notice of Appropriation for claim 39G 20261-00 support that these are claims for water spreading, and the Statements of Claims for both claims 39G 20260-00 and 39G 20261-00 list “dikes to spread water” as a means of conveyance.

3. Through a February 24, 2020 Order Setting Filing Deadline and an April 14, 2020 Order to Show Cause, this Court gave the Claimants two opportunities to submit information or evidence if they disagreed with modifying these claims from “flood” to “water spreading.” The Court informed the Claimants that if nothing was filed by the deadlines, the claims would be modified to “water spreading.” Nothing was submitted by either deadline.

4. On May 4, 2020, Claimant Stephen Kreitingner contacted the Court via phone and indicated that he believed the proposed change to “water spreading” was consistent with the historical use of these claims.

5. Claims 39G 20260-00 and 39G 20261-00 also received the following point of diversion issue remark:

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

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

7. The map attached to the Statement of Claim for 39G 20260-00 indicates a point of diversion within the legal land description for the point of diversion claimed on the Statement of Claim and the Preliminary Decree.

8. The Notice of Appropriation for Claim 39G 20261-00 contains a detailed description of the point of diversion for that claim, which locates the point of diversion within the legal land description claimed on the Statement of Claim and Preliminary Decree.

9. Through its February 24, 2020 Order Setting Filing Deadline and an April 14, 2020 Order to Show Cause, this Court gave the Claimants two opportunities to submit information or evidence if they believed the legal land description for the point of diversion for either claim was inaccurate as it appeared in the Preliminary Decree. The Court informed the Claimants that if nothing was filed by the deadlines, the remark would be removed from the claim. Nothing was filed by either deadline.

10. When Mr. Kreitinger contacted the Court on May 4, 2020, he did not indicate that he disagreed with the removal of this remark.

11. Claim 39G 115408-00 received an issue remark providing notice that the DNRC modified the means of diversion element of the claim during its examination. This notice-type remark states that if no objections are filed, the element will remain as it appeared on the abstract and the remark will be removed from the claim. The claim did not receive any objections.

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 irrigation type issue remarks, and the information upon which those remarks are based, overcome the prima facie status of the Statements of Claim, and the claims can be modified accordingly.

2. The point of diversion issue remarks, and the information upon which those remarks are based, fail to overcome the prima facie status of the Statements of Claim and can be removed from the claims.

3. The notice-type remark has served its notice purpose. It does not raise unresolved issues or require further information and can be removed from claim 39G 115408-00.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, claims 39G 20260-00 and 39G 20261-00 should be modified from flood irrigation to water spreading, and the issue remarks should be removed from the claims in this case.

Post-decree abstracts of the water right claims reflecting the recommended changes are attached to this Report.

DATED this 22nd day of June, 2020.



Eyvind Ostrem
Water Master

Service via USPS Mail

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