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FILED

JUN 01 2020

Montana Water Court

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

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CLAIMANTS: Melissa Tvedt; Michael Tvedt

CASE 39G-R63  
39G 121853-00

**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 121853-00 appeared in the Preliminary Decree for Beaver Creek, Tributary to Little Missouri River (Basin 39G). The claim did not receive objections or notices of intent to appear, but did receive issue remarks during the DNRC's claims reexamination.

### FINDINGS OF FACT

1. Claim 40C 121853-00 received the following substantive issue remark:  
THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 24.3 TIMES THE CAPACITY OF THE RESERVOIR.
2. On December 16, 2019, the Court consolidated the above-captioned claim into Case 39G-R63 and set a filing deadline requiring the Claimants to work with the DNRC under §85-2-248(5), MCA. Subsequently, claimant Michael Tvedt contacted the DNRC Regional Office in Glasgow, MT on December 27, 2019 and stated that the means of diversion is a dike and not a dam. Additionally, Mr. Tvedt noted that while some water is retained behind the dike, irrigation is not dependent on any stored water as there is no controlled means of diversion for the water available during spring runoff.
3. On March 18, 2020, DNRC Water Resources Specialist Pam Weinmeister filed her *Memorandum* in this matter. Ms. Weinmeister's *Memo* states that she was contacted by claimant Michael Tvedt and provided with the above-stated information regarding the irrigation system associated with claim 39G 121853-00. In her *Memo*, Ms. Weinmeister states that in light of the information presented, the means of diversion should be change to "Diversion Dam." Further, the *Memo* states that if the means of diversion is modified, the volume issue remark is resolved and should be removed.
4. Claim 39G 121853-00 also received notice-type issue remark regarding modifications made to the claim by the DNCR during its claim reexamination.

### PRINCIPLES OF LAW

1. 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.

2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. 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.

4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. 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.

6. 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.

7. 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. Section 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 evidence in the record is sufficient to resolve the issue remarks placed on the above-captioned claim.

2. The information provided by claimant Michael Tvedt along with the subsequent recommendation provided in Ms. Weinmeister’s *Memo* overcomes the *prima facie* status of the Statement of Claim for claim 39G 121853-00. The means of diversion should be modified accordingly, and the issue remark should be removed.

3. The notice-type issue remarks on claim 40C 121853-00 served their notice purpose and the issue remarks should be removed.

RECOMMENDATIONS

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

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

DATED this 1<sup>st</sup> day of June, 2020.

  
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Eugene C. White  
Water Master

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