

Montana Water Court
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FILED

JUN 11 2020

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
MUSSELSHELL RIVER BELOW ROUNDUP (BASIN 40C)
PRELIMINARY DECREE

CLAIMANT: Lake Mason Grazing Assn

40C-R289
40C 214317-00
40C 214318-00

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 40C 214317-00 and 40C 214318-00, owned by Lake Mason Grazing Association, appeared in the Preliminary Decree for the Musselshell River, Below Roundup (Basin 40C) issued on June 7, 2017. 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 water rights by the Department of Natural Resources and Conservation (DNRC) during the claim examination process.

FINDINGS OF FACT

1. Claims 40C 214317-00 and 40C 214318-00 are irrigation claims for water from the same source, which use the same means of diversion and reservoir to irrigate the same place of use during the same periods of diversion and use.

2. The claims were decreed with identical issue remarks questioning the reservoir, place of use, period of use, period of diversion, and volume. Each claim also received two notice-type issue remarks stating that the claim was not included in the Basin 40C Temporary Preliminary Decree, and that as a late claim, it may be subordinate to certain permits and reservations of water.

3. On October 8, 2019, this Court ordered the Claimant to work with the DNRC to resolve the issue remarks on these claims. On March 27, 2020, the Court received a memorandum from Matt Schmidt, Water Resources Specialist with the Lewistown Regional Office of the DNRC, stating that he had worked with the Claimant, and recommending the removal of all issue remarks on these claims.

4. The reservoir issue remark on the claims states that the reservoir is not shown in the 1949 Musselshell County Water Resources Survey (WRS) and appears to have been built after the original appropriation. It therefore suggests that there may have been an expansion of the water right.

5. Claims 40C 214317-00 and 40C 214318-00 are based on notices of appropriation dated September 17, 1912, and February 19, 1912, respectively. The

September 1912 Notice of Appropriation and a Notice of Change of Point of Appropriation relating to the February 1912 Notice of Appropriation both reference a reservoir or dam on Willow Creek in Section 34.

6. The reservoir is also visible on 1953 and 1979 aerial photos attached to Mr. Schmidt's memorandum.

7. While the 1949 WRS map does not show the reservoir, the field notes associated with the WRS do reference the reservoir's existence: "Filing in effect, however, United States government removed dam at point of diversion to use water to fill Lake Mason."

8. According to Mr. Schmidt, "the reservoir was present in 1912, removed prior to 1949, and replaced by 1953."

9. These claims were decreed with a maximum place of use of 390 acres and received the following issue remark questioning that place of use:

THE MUSSELSHELL COUNTY WATER RESOURCES SURVEY (1949)
APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

10. Mr. Schmidt reviewed the 1949 water resources survey (WRS) map and identified 333.6 acres of potential irrigation. This is below the claimant contact point range for the 390 acres claimed. He identified 393.7 irrigated acres in both the 1953 and 1979 aerial photos and suggests that irrigation in Section 34 "may have expanded between 1949 and 1953."

11. However, the September 1912 Notice of Appropriation suggests earlier irrigation in some of the potentially expanded place of use (the NE1/4 of Section 34), and the lack of irrigation in that place of use in 1949 is consistent with the dam having been temporarily removed at that time.

12. The remainder of the substantive issue remarks on these claims resulted from the atypical nature of the claims, which are decreed as flood irrigation claims but according to Mr. Schmidt operate more like a water spreading system:

[T]he system operates primarily without manual control, it is dependent on water availability rather than need, and the purpose of the claimed reservoir is to raise the elevation of the water before it enters the dike system.

13. The claims were decreed with year round periods of diversion and periods of use, which led the DNRC to add issue remarks stating that the period of use exceeds the usual growing season for the climatic area and the period of diversion may require modification based on a resolution of the period of use issue.

14. According to Mr. Schmidt's memo, however, the system is dependent on water availability rather than need. It operates during runoff events and diverts water whenever there is enough water in the source. It is not limited by the typical growing seasons, and there is no evidence in the file suggesting the year-round periods of diversion and use are inaccurate.

15. The claims were decreed with a volume of 211.58 acre-feet and a reservoir capacity of 59.5 acre-feet. This led the DNRC to add an issue remark stating that the volume appears excessive for the claimed purpose as it is 6.55 times the capacity of the reservoir. The DNRC places this remark on claims when the reservoir appears too small to store enough water to achieve the decreed volume under a typical flood irrigation system.

16. Unlike a typical storage-based flood irrigation claim, the reservoir for these claims primarily serves to raise the level of the water before it enters the dike system, not to store water for future use. Therefore, the size of the reservoir does not indicate that the volume of these claims is excessive. The evidence before the Court does not suggest that the volume of the claims is inaccurate.

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. 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.

5. 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 reservoir issue remarks, and the information upon which those remarks are based, fail to overcome the prima facie status of these claims. The reservoir issue remarks should be removed from the claims.

2. A preponderance of the evidence establishes that the lack of irrigation shown in the 1949 WRS map is consistent with a temporary pause in irrigating part of the place of use while the dam was removed, not a late expansion of the place of use. The place of use (acres irrigated) issue remarks, and the information upon which those remarks are based, fail to overcome the prima facie status of these claims. The place of use issue remarks should be removed from the claims.

3. The period of diversion, period of use, and volume issue remarks, and the information upon which those remarks are based, fail to overcome the prima facie status of these claims. These remarks should be removed from the claims.

4. The notice-type issue remarks have served their notice purpose and should be removed from the claims.

RECOMMENDATIONS

Based on the foregoing 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 right claims reflecting the recommended changes are attached to this Report.

DATED this 11th day of June, 2020.



Eyvind Ostrem
Water Master

Service via USPS Mail

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