

Montana Water Court
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FILED

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Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
SAGE CREEK BASIN (40G)
PRELIMINARY DECREE

CLAIMANT: Big Sage Ranch Inc.

OBJECTOR: Peggy C. Nystrom

CASE 40G-R158

40G 139376-00

40G 139377-00

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 within **10 days** of the stamped date appearing on the Master's Report if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Maser's 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. 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

INTRODUCTION

Claims 40G 139376-00 and 40G 139377-00, owned by Big Sage Ranch Inc, appeared in the Preliminary Decree for Sage Creek (Basin 40G) with issue remarks from

the Montana Department of Natural Resources and Conservation's (DNRC) preparation of the preliminary decree. Peggy Nystrom filed an objection and verified motion to amend place of use for claim 40G 139376-00. The Water Court consolidates the claims into water court case 40G-R158 and presently resolves the issues.

ISSUE

1. *Whether a preponderance of the evidence supports that the accurate historical place of use for claim 40G 139376-00 is in the SENENW of Section 18, Township 36N, Range 6E, Liberty County, Montana.*

APPLICABLE LAW

“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. The Water Court resolves objections and issue remarks before issuance of a final decree and 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.

DNRC's express duty in the adjudication process is to identify potential issues with water rights and to provide factual analysis to the Water Court prior to decree issuance. Rules 1(b) and 2(a), W.R.C.E.R. The Montana Water Right Claim Examination Rules (W.R.C.E.R.) specify the process through which DNRC examines water right claims within the scope of its duty. Rule 1(b), W.R.C.E.R. The Water Court is not bound by the W.R.C.E.R. or the technical assistance provided by the DNRC. Rules 1(b) and 2(a), W.R.C.E.R.

To address inconsistencies in DNRC's review of water rights claims, the Water Court issued a December 14, 2012 order requiring DNRC to standardize the legal land descriptions for points of diversion appearing on non-decreed pre-March 28, 1997 claims in basins subject to reexamination. *See* Water Court Order Requiring Reexamination (December 14, 2012); §§ 85-2-270(1), -271(1)(a), -282(6), MCA. The order did not authorize DNRC to make the same changes to places of use. DNRC placed issue remarks on claims to notify the Water Court that the place of use may require modification based on its modification to the claim's point of diversion pursuant to the December 14, 2012 order.

After the Water Court issues a temporary preliminary decree or a preliminary decree in a basin, an objector may file an objection. Rule 5(a),(c), W.R.Adj.R; § 85-2-233(2), MCA. The objection period provides an opportunity for parties with an ownership interest in water to raise issues regarding their own water rights or other water rights in the preliminary decree. Section 85-2-233(1)(b); *Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 33, 361 Mont. 77, 255 P.3d 179.

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 the DNRC, bears the burden of proof. *Nelson v. Brooks*, 2014 MT 120, ¶¶ 34, 37, 375 Mont. 86, 329 P.3d 558.

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. Section 85-2-248(3), MCA.

Additionally, the Water Court may correct a clerical mistake found in a judgment, order, or other part of the record on motion or on its own, with or without notice. Rule 60(a), M.R.Civ.P.

DISCUSSION

1. *Whether a preponderance of the evidence supports that the accurate historical place of use for claim 40G 139376-00 is in the SENENW of Section 18, Township 36N, Range 6E, Liberty County, Montana.*

Claim 40G 139376-00 is a stock-use claim for surface water from an onstream reservoir on the North Fork of Scotch Coulee in Liberty County, Montana. Nystrom’s objection and verified motion to amend state the place of use for claim 40G 139376-00 is in the SENENW of Section 18, Township 36N, Range 6E, Liberty County. An issue remark

appearing on the claim confirms the correction to the place of use requested by Nystrom's objection and verified motion to amend. The issue remark states:

THE PLACE OF USE APPEARS TO NEED MODIFICATION BASED ON THE DNRC CORRECTION TO THE POINT OF DIVERSION AND RESERVOIR RECORD. THE CORRECT PLACE OF USE LEGAL LAND DESCRIPTION APPEARS TO BE THE SENENW SEC 18 TWP 36N RGE 6E LIBERTY COUNTY.

Pursuant to the Water Court's December 14, 2012 order, DNRC corrected the claim's point of diversion to reflect the accurate historical location of the onstream reservoir, but did not have the authority to correct the claim's place of use—the location of the same onstream reservoir. The preliminary decree abstract for claim 40G 139376-00 states the place of use is in the SWNENW of Section 18, Township 36N, Range 6E, Liberty County. However, the point of diversion and reservoir record indicate the onstream reservoir associated with the claim is in the SENENW of Section 18, Township 36N, Range 6E, Liberty County.

The evidence in the record resolves the issue remark appearing on claim 40G 117261-00. A preponderance of the evidence, including the objection, verified motion to amend, and DNRC's issue remark, supports that the accurate historical legal land description for the onstream reservoir—the place of use associated with the stock claim—is in the SENENW of Section 18, Township 36N, Range 6E, Liberty County, consistent with the legal land descriptions for the claim's point of diversion and onstream reservoir.

The claims in water court case 40G-R158 additionally received issue remarks providing notice that DNRC modified other elements of the claims during its reexamination of the basin. The issue remarks state if no objections are filed to the claims, the remarks will be removed. The claims did not receive objections or notices of intent to appear, no proceedings are required, and the issue remarks shall be removed.

RECOMMENDATION

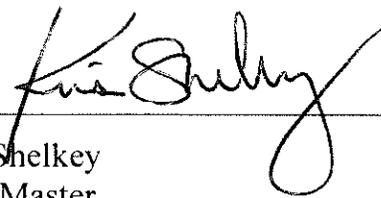
This Water Master recommends the Water Court to remove the resolved issue remarks appearing on the claims and to modify the legal land description for the place of use (the onstream reservoir) associated with claim 40G 139376-00, consistent with

Nystrom's objection and verified motion to amend, DNRC's issue remark, and historical use, as follows:

| <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 | | SENENW | SWNENW | 18 | 36N | 6E | LIBERTY |

Post-decree abstracts for the water rights claims are attached to this Master's Report.

DATED this 4th day of June, 2020.



Kirsia Shelkey
Water Master

Service via USPS Mail:

Big Sage Ranch Inc.
% Peggy C. Nystrom
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