

Montana Water Court
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 **FILED**
MAY 20 2020
Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
ST. MARY RIVER – BASIN 40T

CLAIMANT: United States of America (Bureau of Reclamation)

COUNTEROBJECTORS: Davies Ranch Co.; Richard E. Grabofsky;
Ross 8 Bar 7 Ranch; S Bar B Ranch Co.

~~NOTICE OF INTENT TO APPEAR: Malta Irrigation District~~

CASE 40T-33
40T 40955-00
40T 40958-00
40T 40959-00
40T 40960-00

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

FINDINGS OF FACT

1. The claims in this case are owned by the United States Bureau of Reclamation (BOR) and claim water associated with the BOR's Milk River Project. The claims appeared in the 40T Preliminary Decree with DNRC issue remarks.

2. The claims received several objections. All four claims received objections from the Blackfeet Tribe. In June 2017, the Blackfeet Tribe withdrew its objections to the claims pursuant to the Blackfeet-Montana Water Compact and the Blackfeet Water Rights Settlement Act. Malta Irrigation District filed notices of intent to appear on all four claims. In November 2019, Malta Irrigation District withdrew its notices of intent to appear. Davies Ranch Co., Richard E. Grabofsky, Ross 8 Bar 7 Ranch Inc., and S Bar B Ranch Co. filed counterobjections to claims 40T 40958-00 and 40T 40960-00.

3. On January 22, 2020, the United States filed a stipulation entered into between the BOR, Davies Ranch Co., Richard E. Grabofsky, Ross 8 Bar 7 Ranch Inc., and S Bar B Ranch Co. The Stipulation resolves the objections to the claims.

4. The Stipulation indicates that claims 40T 40958-00 and 40T 40960-00 do not accurately reflect historical use and should be dismissed from the adjudication.

5. The Stipulation requests several modifications to claims 40T 40955-00 and 40T 40959-00.

6. Claim 40T 40955-00 is a filed right with a May 29, 1912 priority date for the storage of water from Swiftcurrent Creek in Sherburne Reservoir. The claim received many issue remarks.

Several of those issue remarks were added because the claim is an interbasin transfer claim that did not appear in the first decrees for several of the basins where it is used. The remarks that identify basins in which the claim has not yet appeared in a decree (Basins 40H, 40N, and 40S) will remain on the claim to ensure adequate notice is provided to water users in those basins. Claims 40T 40955-00 has appeared in Basins 40K and 40L, so those remarks may be removed.

One issue remark states that the claim received objections in Basin 40J. This Master's Report addresses those objections; that remark may be removed.

Claim 40T 40955-00 has an issue remark concerning an amendment that was filed in 2008. The remark provided notice that the amendment substantially changed the originally filed statement of claim. An additional remark provided notice that there are no guidelines for the purpose “sale” and that the claim was examined using information provided by the claimant. These are notice-type issue remarks that do not overcome the prima facie status of the claim and may be removed.

Two of the issue remarks concern whether the claim is a state-based right or part of the Blackfeet or Fort Belknap Tribal Water Right. The claim was filed as a state-based right and there is no evidence before the court to suggest it is not a state-based right. The issue remarks do not overcome the prima facie status of the claim and should be removed.

7. In the Stipulation, the parties requested several modifications to claim 40T 40955-00. The modifications amount to clarifications and refinements. They do not enlarge or expand any elements of the claim.

Pursuant to the stipulation the purpose of claim 40T 40955-00 should be amended to “storage for multiple uses,” encompassing the various purposes the water is used for.

The Stipulation requests the purpose clarification be amended to include “commercial” uses; the diversion means information remark be modified to refer to the North Fork of the Milk River, rather than Willow Creek; the Place of Use information remark be amended to include the towns of Rudyard, Gildford, Kremlin, Joplin, Hingham and Inverness; and the supplemental rights remark be amended to maintain consistency with the stipulated amendments to other Milk River Project claims.

Attached to the Stipulation is the parties proposed amended abstract, which includes modifications to the place of use for claim 40T 40955-00. The acreage identified in the place of use remark will not change based on the requested modifications, meaning that there is no increase to the place of use. The requested place of use changes refine the decreed place of use to more accurately describe the service area and should be accepted.

8. Claim 40T 40959-00 is a filed right with a May 29, 1912 priority date for a direct flow diversion from the St. Mary River to storage outside of basin 40T for multiple uses. The purpose appearing on the Preliminary Decree abstract is “sale”. The claim

received many issue remarks, many of them similar to the remarks appearing on claim 40T 40955-00.

Like claim 40T 40955-00, several of the issue remarks identify claim 40T 40959-00 as an interbasin transfer claim that did not appear in the first decrees for several of the basins where it is used. The remarks that identify basins in which claim 40T 40959-00 has not yet appeared in a decree (Basins 40H, 40N, and 40S) will remain on the claim to ensure adequate notice is provided to water users in those basins. Claim 40T 40959-00 has appeared in Basins 40K and 40L, so those remarks may be removed.

This Master's Report addresses the objections received in Basin 40J; that remark may be removed.

Claim 40T 40959-00 has an issue remark concerning an amendment that was filed in 2008. The remark provided notice that the amendment substantially changed the originally filed statement of claim. An additional remark provided notice that there are no guidelines for the purpose "sale" and that the claim was examined using information provided by the claimant. These are notice-type issue remarks that do not overcome the prima facie status of the claim and may be removed.

The claim received an additional issue remark concerning period of diversion which is discussed below.

9. In the Stipulation, the parties requested several modifications to claim 40T 40959-00. The modifications amount to clarifications and refinements. They do not enlarge or expand any elements of the claim.

The stipulation provides that the purpose of claim 40T 40959-00 should be modified from "sale" to "diversion out of basin." Because a diversion is not in and of itself a use of water, it is more appropriate to describe the purpose as "diversion out of basin" with the purpose clarification noting that the water is used "for multiple purposes."

The Stipulation requests the purpose clarification be amended to incorporate several modifications to better describe how the water is used; the volume quantification be replaced with a volume information remark limiting the volume to the amount put to historical and beneficial use; the Place of Use information remark be amended to include the towns of Rudyard, Gildford, Kremlin, Joplin, Hingham and Inverness; and the

supplemental rights remark be amended to maintain consistency with the stipulated amendments to other Milk River Project claims.

Attached to the Stipulation is the parties proposed amended abstract, which includes modifications to the place of use for claim 40T 40959-00. The acreage identified in the place of use remark will not change based on the requested modifications, meaning that there is no increase to the place of use. The requested place of use changes refine the decreed place of use to more accurately describe the service area and should be accepted.

Finally, the stipulation states that the period of use should be reduced from year-round to March 23 - November 22 and that the period of diversion should remain year-round. The period of use will be changed to March 23 - November 22. However, contrary to what the stipulation provides, claim 40T 40959-00 appeared in the Preliminary Decree with a period of diversion from March 1 - October 31, not year-round.

An issue remark appearing on claim 40T 40959-00 states:

WHEN THIS CLAIM WAS ORIGINALLY DECREED, THE PERIOD OF DIVERSION WAS NOT INCLUDED AS AN ELEMENT OF THE CLAIM. IN 2008, THE PERIOD OF DIVERSION ELEMENT WAS ADDED TO ALL CLAIM ABSTRACTS. IT IS NOT CERTAIN IF THE PERIOD OF DIVERSION DATES ADDED TO THIS CLAIM ACCURATELY REFLECT THE HISTORICAL PERIOD OF DIVERSION. MORE INFORMATION IS REQUIRED.

Period of diversion was not an element added to claims until 2008. See December 11, 2008 Order on Period of Diversion. When the DNRC added period of diversion to claims it was instructed to match the period of diversion to the period of use and add the above issue remark concerning the period of diversion. The October 2008 amendment filed for claim 40T 40959-00 amended the period of use to year-round, which means a year-round period of diversion should have been added to claim 40T 40955-00. But a different period of diversion was added instead, apparently due to oversight or error.

Based on the information in the claim file, the history of amendments filed for this claim, and the information from the claimant, the period of diversion for claim 40T 40959-00 should be changed to year-round and the issue remark should be removed.

CONCLUSIONS 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. 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.

2. In Case 40J-99, the Water Court addressed whether multiple purposes can be listed on the same abstract. The Chief Water Judge held:

there is no statute, rule, or case which prevented the United States from identifying multiple purposes on one abstract. Such consolidations are permissible if they can be accomplished without sacrificing clarity, and without leading to the potential for abuse through expansion of water rights beyond their historical limits.

Order Vacating Master's Order and Approving Stipulation, pp. 14-15.

Claims 40T 40955-00 and 40T 40959-00 both appeared in the 40T Preliminary Decree with elements and information remarks putting water users on notice that the water rights claimed multiple purposes. The changes requested by the parties in the stipulation do not expand the rights beyond their historical limits. The changes clarify several aspects of the claims without increasing any elements.

3. Section 85-2-248(2), MCA requires the Water Court to resolve all issue remarks that are not resolved through the objection process. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. § 85-2-248(3), MCA. All issue remarks that were able to be resolved at this point in the adjudication have been resolved. Issue remarks that identify basins that the claims have not yet been decreed in will remain on claims 40T 40955-00 and 40T 40959-00 until the claims have appeared in those basins.

4. The Water Court may correct a clerical mistake or a mistake arising from oversight or omission where one is found in a part of the record. Rule 60(a), M.R.Civ.P.

5. Settlement agreements are subject to review and approval of the Water Court. Rule 17(a), W.R.Adj.R. The settlement documentation in this Case should be accepted by the Court.

RECOMMENDATIONS

1. Claims 40T 40955-00 and 40T 40959-00 should be modified as described above and the resolved issue remarks should be removed from the abstracts.
2. Claims 40T 40958-00 and 40T 40960-00 should be dismissed from the adjudication.

Post Decree Abstracts of Water Right Claims are served with the Report to confirm that the recommended modifications and terminations have been made in the state's centralized record system.

DATED this 20th day of May, 2020.

 Digitally signed
by Madeleine
Weisz

Madeleine Weisz
Senior Water Master

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Note: Caption Updated 5-11-20