

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
(406) 586-4364
1-800-624-3270
Fax: (406) 522-4131
watercourt@mt.gov

FILED

JUN 04 2020

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
JEFFERSON RIVER BASIN (41G)
PRELIMINARY DECREE

CLAIMANTS: Melvin D. Maichel; Meri C. Maichel

ON MOTION OF THE MONTANA WATER COURT

CASE 41G-R2
41G 115564-00
41G 118264-00

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. Claims 41G 115564-00 and 41G 118264-00 are irrigation claims owned by Melvin and Meri Maichel. Both claims assert a priority date of December 31, 1879 and were claimed as decreed rights.

2. Claims 41G 115564-00 and 41G 118264-00 appeared in the 41G Preliminary Decree with notice issue remarks. The claims did not receive any objections. On November 5, 2020, claims 41G 115564-00 and 41G 118264-00 were called in on motion of the water court because of what appeared to be a potential decree exceeded situation between the two claims.

3. A filing deadline was set for the claimants to address the Court's on motion concern. On January 10, 2020, the Claimants filed comments concerning the decree exceeded situation. The Claimants asserted that their predecessor, Mrs. Finch, was decreed two sperate 100 MI rights in the 1899 decree. In support, the Maichels attached Exhibit A, which is a copy of interrogatories from the 1899 District Court Order.

4. The interrogatories do indicate that there are two separate 1899 water rights for 100 MI with an 1879 priority date; one from the Mrs. Finch Ditch No. 1 and one from the Mrs. Finch Ditch No. 2. However, there is no mention of the Mrs. Finch Ditch No. 2 in the court's 1899 final list of decreed rights. In the 1899 decree, Mrs. Finch is only decreed one 1879 right for 100 MI. Accordingly, the Master determined the decree exceeded issue was not resolved and set an additional filing deadline for the Maichels to address the decree exceeded issue.

5. On May 1, 2020, the Maichels filed a status report. In the status report, the Maichels acknowledge that only one 1879 Mrs. Finch right for 100 MI appears in the 1899 decree. The claimants argue that the reference to the second 100 MI right associated with Mrs. Finch Ditch No. 2 was erroneously left out of June 3, 1899 decree.

6. The Maichels argument is compelling because, as they note, the District Court fully adopted the jury's findings of facts with a few noted changes. The District Court stated that it was modifying, correcting, and amending the jury findings and provided very specific and detailed modifications, corrections, and amendments. The

court adopted findings that referred to each of the separate 1879 Mrs. Finch rights. The 1899 court did not make any mention of striking findings concerning a second Mrs. Finch right for 100 MI with an 1879 priority date. Accordingly, it appears that the failure to name a second 1879 Mrs. Finch 100 MI right from Mrs. Finch Ditch No. 2 in the 1899 decree tabulation of rights was an error due to oversight.

7. Nonetheless, as the Maichels concede, “the District Court clearly did not list two separate water rights to Mrs. Finch in its June 3, 1899 Decree.” While there is evidence that supports the use of claim 41G 115564-00 since 1879, the right was not included in the 1899 decree, or the subsequent 1917 decree. To call claim 41G 115564-00 a decreed right is confusing and potentially misleading. It is more accurately described as a use right.

8. Changing claim 41G 115564-00 to a use right addresses the decree exceeded issue raised by the Court. The on-motion concern of the Court is resolved.

9. The issue remarks that appear on claims 41G 115564-00 and 41G 118264-00 are notice issue remarks. They provide notice of certain modifications made to the claims. Notice remarks may be removed if no objections are filed to the claims. The issue remarks appearing on claims 41G 115564-00 and 41G 118264-00 should be removed.

CONCLUSIONS OF LAW

1. A properly filed claim of an existing right or an amended claim of existing right constitutes 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. The Water Court does not distinguish between use rights, filed rights, or decreed rights when it issues final decrees. Case 41O-209, Order Regarding Admissibility of Notices of Appropriation and Burden of Proof, at 2, January 31, 2013 (citing § 85-2-234, MCA). The conflict between decreed rights, filed rights and use rights and the potential for their simultaneous co-existence is one of the primary reasons the Legislature enacted the Water Use Act of 1973 and provided for a statewide mandatory adjudication

of all existing rights to the use of water. A fundamental mission of the Water Court is to adjudicate all existing rights without granting favor to any particular type of historical right. Case 41O-209, Order Re Admissibility of NOAs at 13.

3. While only one 1879 Mrs. Finch right for 100 MI was decreed in the 1899 Decree, the evidence establishes by a preponderance of the evidence that two separate Mrs. Finch rights for 100 MI were appropriated and put to use in 1879. The evidence before the court supports modifying the “type of historical” right for claim 41G 115564-00 from “decreed” to “use” so it is clear that there is not a decree exceeded issue between the two claims, and so that both claims 41G 115564-00 and 41G 118264-00 are recognized as valid existing rights.

RECOMMENDATIONS

1. Claim 41G 115564-00 should be modified to a use right.
2. The issue remarks should be removed from claims 41G 115564-00 and 41G 118264-00.
3. The on-motion concern of the Court should be considered resolved. Post Decree Abstracts of Water Right Claims are served with the Report to confirm that the modifications have been made in the state’s centralized database.

DATED this *4th* day of *June*, 2020.

 Digitally signed by
Madeleine Weisz

Madeleine Weisz
Senior Water Master

Service Via Electronic Mail:

Ryan K. Mattick
Cusick, Farve, Mattick & Refling, P.C.
PO Box 1288
Bozeman, MT 59771-1288
(406) 587-5511
office@cmrlawmt.com