

Montana Water Court  
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FILED

JUN 11 2020

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
YELLOWSTONE DIVISION  
CLARKS FORK YELLOWSTONE RIVER (BASIN 43D)  
PRELIMINARY DECREE

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CLAIMANTS: Angela Douglas; Brandon Douglas; Jeff Douglas;  
Dixie A. Garner

**43D-R203**  
43D 198654-00

**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 the 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 the Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules requires written objections to the Master's Report must be filed within 10 days of the date of the Master's Report. Because the 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. This means your objection must be received no later than **13 days** from the above stamped date.

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**

### **Statement of the case**

Irrigation claim 43D 198654-00 appeared in the Preliminary Decree with an issue remark. Issue remarks result from Department of Natural Resources and Conservation ("DNRC") claims examination. Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim.

The issue remark states:

WATER IS NOT DIVERTED FROM THE SOURCE CLAIMED. A HISTORICAL APPROPRIATION FROM THE CLAIMED SOURCE CANNOT BE CONFIRMED.

Montana law requires the Water Court to resolve issue remarks. Claimants were ordered to meet with personnel from the DNRC to attempt resolution of the issue remark. Claimants did not meet with the DNRC. The Memorandum reported resolution of the issue remark based on the current record.

### **Issues**

1. What is the historically accurate source?
2. Is the source issue remark resolved?

### **Findings of Fact**

A preponderance of evidence establishes the following facts:

1. Irrigation claim 43D 198654-00 identifies its source as Red Lodge Creek and its point of diversion as the Leimbach Ditch headgate. An information remark under the source states, "Rock Creek is used as a natural carrier to convey water from Red Lodge Creek to the point of diversion."
2. DNRC reports:

- The headgate for the Leimbach Ditch remains in the same historical pre-July 1, 1973 location.
- Historically the Leimbach Ditch diverted water directly out of Red Lodge Creek right before Red Lodge Creek merged with Rock Creek.
- The channels of Red Lodge Creek and Rock Creek shifted. Rock Creek now carries Red Lodge Creek water for roughly 650 feet until it is taken out of Rock Creek at the Leimbach Ditch headgate.

3. DNRC recommends no modifications to claim 43D 198654-00 and removal of the issue remark.

4. The historically accurate source, Red Lodge Creek, is correctly identified by the preliminary decree abstract.

### **Principles of law**

1. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. Prima facie proof may be overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R. A preponderance of the evidence is a “modest standard” and is evidence that demonstrates the fact to be proved is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 348, 240 P.3d 628.

2. The Montana Water Court is permitted to use information submitted by the Department of Natural Resources and Conservation, the statement of claim, information from approved compacts, and any other data obtained by the Court to evaluate water right claims. Section 85-2-231(2), MCA.

3. When resolving issue remarks, the Montana 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.

4. If the Montana Water Court cannot resolve issue remarks based upon information in the claim file or information available to the Court, claimants shall be

required to confer with the DNRC to attempt resolution of the issue remarks. Claimants shall file documentation to resolve the issue remarks, and the DNRC shall submit recommendations regarding disposition of the issue remarks. Section 85-2-248(5), MCA.

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

## **Analysis**

### **Issues 1 and 2 - source and source issue remark**

Statement of claim 43D 198654-00 identifies Red Lodge Creek as its source. An information remark appearing under source memorializes that Rock Creek is a natural carrier of Red Lodge Creek water for this claim. The DNRC reports the source is correctly identified. The DNRC Memorandum confirms the historical accuracy of the source identified by *prima facie* statement of claim 43D 198654-00. The claim file and DNRC Memorandum provide a sufficient basis to resolve the source issue remark.

### **Conclusion of law**

The historically accurate source is Red Lodge Creek. The source issue remark is resolved.

## **Recommendations**

Irrigation claim 43D 198654-00 accurately reflects historical use. No changes to the elements of the claim should be made.

The source issue remark should be removed from the claim abstract.

A Post Decree Abstract of Water Right Claim accompanies this report to confirm removal of the issue remark in the state's centralized water right record system.

DATED this 17<sup>th</sup> day of JUNE, 2020.

  
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Anna M. Stradley  
Senior Water Master

**Service via USPS Mail**

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