

Montana Water Court
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FILED

JUN 25 2020

Montana Water Court

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

CLAIMANTS: Cindy Reiss; Greg Reiss

CASE 43D-R338
43D 10215-00

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

Cindy Reiss and Greg Reiss fish and wildlife claim 43D 10215-00 appeared in the Preliminary Decree with issue remarks. 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 claim received issue remarks concerning means of diversion, flow rate, volume, and validity of the claim.

Montana law requires the Water Court to resolve issue remarks. The issue remarks, except the means of diversion issue remark, were resolved based upon information in the claim file and before the Court. The means of diversion issue remark was not resolved through the objection process and there was not enough information in the claim file or before the Court to resolve the issue remark. Pursuant to § 85-2-248(3), MCA, the Court may first contact claimants for further evidence in an attempt to resolve the issue remarks. Therefore, a deadline was set for Cindy Reiss and Greg Reiss to file evidence resolving the means of diversion issue remark.

Greg Reiss filed a statement. If co-claimant Cindy Reiss disagrees with the information found in Greg Reiss’s statement, Cindy Reiss should object to this Master’s Report.

Issues

Preliminary Decree abstract 43D 10215-00 has an information remark for the flow rate and volume, and identifies “instream” as the means of diversion.

1. What is the historically accurate flow rate and volume?
2. Is the flow rate and volume issue remark resolved?
3. What is the historically accurate means of diversion?
4. Is the means of diversion issue remark resolved?
5. Is the issue remark concerning validity resolved?

Findings of fact

1. Statement of claim 43D 10215-00 identifies a 45.00 GPM flow rate and 72.40 AF volume.
2. The flow rate and volume identified by the statement of claim are afforded prima facie proof.
3. The 45.00 GPM and 72.40 AF identified by the statement of claim are historically accurate and should be added to the abstract of claim 43D 10215-00.
4. Greig Reiss filed a statement. Mr. Reiss confirmed headgate is the historically accurate means of diversion.
5. A preponderance of evidence establishes headgate is the historically accurate means of diversion.
6. Claim 43D 10215-00 is a valid claim.

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. This prima facie proof may be contradicted and 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. 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.

5. A clerical mistake or mistake arising from omission or oversight may be corrected by the court at any time. Rule 60(a), M.R.Civ.P.

Analysis

Issues 1 and 2 - flow rate and volume; flow rate and volume issue remark resolution

The flow rate and volume notice issue remark does not overcome the prima facie proof afforded statement of claim 43D 10215-00. The issue remark notified claimants and other water users of their opportunity to object to the reinstatement of the prima facie 45.00 GPM flow rate and 0.75 AF volume. The issue remark contains a typographical error. The remark should identify the prima facie 72.40 AF volume identified by statement of claim 43D 10215-00. The remark instructed claimants and other water users that if no objections were filed to the flow rate and volume identified by the issue remark, the flow rate and volume would be reinstated. No objections were filed against the claim and the deadline to file objections has expired. The flow rate and volume issue remark served its notice purpose. The 45.00 GPM flow rate and 72.40 AF volume should be reinstated.

Conclusions of law

The historically accurate flow rate is 45.00 GPM. The historically accurate volume is 72.40 AF. The flow rate and volume notice issue remark served its purpose and should be removed from the claim.

Issues 3 and 4 – means of diversion; means of diversion issue remark resolution

The means of diversion issue remark, the information resulting in the issue remark, and Greg Reiss's statement overcomes, by a preponderance of evidence, the prima facie proof afforded the means of diversion for claim 43D 10215-00.

Conclusions of law

Service via USPS Mail

Cindy Reiss

Greg Reiss

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Note: Service List Updated 6.4.20