

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

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: Cody L. Barent; Tanya R. Barent

CASE 43D-R44
43D 39533-00

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 39533-00 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 issue remarks concern:

- place of use/maximum acres irrigated,
- flow rate,
- priority date, and
- an amendment not applied to the claim.

Montana law requires the Water Court to resolve issue remarks using the procedures set forth in § 85-2-248, MCA. No objections were filed to the claim. The issue remarks concerning priority date and an overlapping place of use were resolved by information in the claim file and information before the court. The maximum acres irrigated/place of use, flow rate, and the lack of an implemented amendment issue remarks were not addressed and resolved during the objection process, and there was not enough information in the claim file or before the court to resolve the issue remarks. Therefore, claimants were ordered to meet with the DNRC to attempt resolution of the issue remarks.

Issues

Preliminary Decree abstract 43D 39533-00 identifies a July 25, 1894 priority date, a 224.40 GPM flow rate, and a 20.83 acre place of use.

- 1a. What is the historically accurate priority date?
- 1b. Is the priority date issue remark resolved?
2. Is the overlapping place of use issue remark resolved?
- 3a. What is the historically accurate maximum number of acres?

- 3b. Are the maximum acres irrigated issue remarks resolved?
- 4a. Does the flow rate require modification based upon resolution of the maximum acres irrigated issue?
- 4b. Is the flow rate issue remark resolved?
5. Is the lack of an implemented amendment issue remark resolved?

Findings of fact

1. The preliminary decree abstract of claim 43D 39533-00 identifies the historically accurate priority date, July 25, 1894.
2. The DNRC Memorandum reported claimants failed to contact the DNRC to attempt resolution of the maximum acres irrigated and flow rate issue remarks. DNRC recommended the following modifications to resolve the maximum acres irrigated and flow rate issue remarks:
 - The maximum acres irrigated by claim 43D 39533-00 should be reduced to 9.73.
 - The flow rate should be reduced to 165.41 GPM.
3. The historically accurate maximum acres irrigated by claim 43D 39533-00 are 9.73.
4. The historically accurate flow rate for claim 43D 39533-00 is 165.41 GPM.

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. 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.

6. All parties subject to the jurisdiction of the Montana Water Court in this adjudication have the obligation to comply with Orders of this Court, including Orders issued by a Master appointed by the Court. If a claimant fails to comply with an Order issued by the Court in its review of issue remarks, the Court may amend the claim to conform with information found in the claim file and information before the Court. Section 85-2-248(9)(a),(b), MCA.

Analysis

Issues 1a and 1b – priority date; priority date issue remark resolution

The claim file and information before the court provide a sufficient basis to resolve the priority date issue remark. The above captioned claim appeared in the Preliminary Decree for this basin with an issue remark noting it is a filed right with a priority date predating a district court decree for Rock Creek. The record does not

indicate why this claim was not included in Case No. 275, Carbon County. The issue remark is not supported by evidence sufficient to overcome the prima facie proof afforded the priority date for this claim.

Conclusions of law

The preliminary decree abstract of claim 43D 39533-00 identifies the historically accurate priority date, July 25, 1894. The priority date issue remark is resolved.

Issue 2 - overlapping place of use issue remark resolution

The overlapping place of use issue remark identifies an overlapping place of use between the claim in this case and claims 43D 14963-00 and claim 43D 195929-00.¹ The overlapping place of use issue remark is resolved based upon information before the Court. The Water Court dismissed claim 43D 195929-00 from the adjudication in 1999. Claim 43D 195929-00 is no longer an active claim, and therefore, no longer has an overlapping place of use with claims 43D 39533-00 and 43D 14963-00. The claim should have been removed from the issue remark in 1999.

DNRC incorrectly clarified and corrected the place of use for claim 43D 14963-00 during claims examination to the S2SW of Section 35, Township 6 South, Range 20 East. The historical place of use for claim 43D 14963-00 is the S2NE of Section 35, Township 6 South, Range 20 East. (See claim file 43D 14963-00 claims examination worksheet signed and dated Apr. 11, 1989; Master’s Report, Case 43D-R276, Analysis of Issues 2a and 2b.)

The correction to the place of use legal land description for claim 43D 14963-00 results in claims 43D 39553-00 and 43D 14963-00 no longer having overlapping places of use.

Conclusion of law

The overlapping place of use issue remark is resolved.

¹ The overlapping place of use issue remark contains a typographical error. The remark reference claim 43D 14936-00. The remark should reference claim 43D 14963-00.

Issues 3a and 3b – maximum acres irrigated; maximum acres irrigated remark resolution

The maximum acres irrigated issue remarks concerning could not be resolved based upon information in the claim file.

Claimants were ordered to meet with personnel from the Billings Regional Office of the DNRC to address the issue remark pursuant to § 85-2-248, MCA. On February 10, 2020, the DNRC filed a Memorandum. The DNRC reported claimants did not contact the DNRC. The Memorandum recommended modifications for claim 43D 39533-00 to resolve the issue remarks on the claim. Ms. Gray confirmed 9.73 acres of irrigation on 1962 aerial photos and recommended the maximum acres irrigated for claim 43D 39533-00 be reduced to 9.73 acres irrigated.

An Order was issued setting a deadline for claimants to show cause why the claim should not be amended as recommended by Ms. Gray to resolve the maximum acres irrigated issue remarks. Claimants failed to comply with this filing deadline.

Claimants failure to provide any evidence to address or resolve the maximum acres irrigated issue remarks leaves the information in the claim file, Ms. Gray's review of historical aerial photos, and Ms. Gray's recommendations as strong evidence of actual historical use.

Based on the information in the claim file, the DNRC's recommendations, and the claimants' failure to comply with Orders issued by the Water Master, the claim should be amended as recommended by the DNRC.

Several maps created by the DNRC depicting the reduced place of use reside in the claim file.

Conclusions of law

The historically accurate maximum number of acres irrigated for claim 43D 39533-00 is 9.73. The maximum acres irrigated issue remarks are resolved.

Issues 4a. and 4b. – flow rate; flow rate issue remark resolution

Ms. Gray recommended a reduced flow rate of 165.41 GPM for claim 43D 39533-00 based upon her recommended reduced maximum acres irrigated and the DNRC guideline of 17.00 GPM/acre.

An Order was issued setting a deadline for claimants to show cause why the claim should not be amended as recommended by Ms. Gray to resolve the flow rate issue remark. Claimants failed to comply with this filing deadline.

Claimants failure to provide any evidence to address or resolve the flow rate issue remarks leaves the information in the claim file, Ms. Gray's review of the claim, and Ms. Gray's recommendations as strong evidence of actual historical use.

Based on the reduced maximum number of acres irrigated for claim 43D 39533-00, the DNRC's recommendation concerning the maximum acres irrigated for the claim and the 17.00 GPM/acre DNRC guideline, and the claimants' failure to comply with Orders issued by the Water Master, the claim should be amended as recommended by the DNRC.

Conclusions of law

The historically accurate flow rate for claim 43D 39533-00 is 165.41 GPM. The flow rate issue remark is resolved.

Issue 5 – lack of implemented amendment issue remark resolution

Claimants lack of participation in this case signals their agreement with the resolution proposed by DNRC, not the resolution proposed by the March 29, 1991 amendment.

Conclusion of law

The lack of an implemented amendment issue remark is resolved.

Recommendations

Based upon the foregoing, claim 43D 39553-00 should be amended as follows to accurately reflect historical use.

FLOW RATE: 224.40 GPM 165.41 GPM

MAXIMUM ACRES: 20.83 9.73

PLACE OF USE:

	<u>ACRES</u>	<u>GOVT LOT</u>	<u>OTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
TOTAL:	9.73 20.83		S2SW	35	6S	20E	CARBON

The issue remarks appearing on the claim should be removed.

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

DATED this 25th day of JUNE, 2020.


Anna M. Stradley
Senior Water Master

Service via USPS Mail

Cody L Barent
Tanya R Barent
1830 Stillmeadow Dr.
Billings, MT 59106-3781