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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: Barbara M. Ryan; S C Ryan

OBJECTORS: William D. Burgan; Barbara M. Ryan; S C Ryan; Sue  
Schwend

NOTICE OF INTENT TO APPEAR: Sandra J. Barker; Robert B.  
Kerr

INTERVENOR: Ken Kaufman

**CASE 43D-R6**  
43D 195943-00  
43D 195944-00  
43D 195945-00  
43D 216354-00

**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**

The above captioned claims received objections. The claims, except claim 43D 216354-00, also received notices of intent to appear. All elements of claims 43D 195943-00, 43D 195945-00, and 43D 216354-00, and flow rate, volume, maximum acres irrigated, place of use, point of diversion, and means of diversion for claim 43D 195944-00 appeared on the objection list for Basin 43D.

The claims 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 on stock claim 43D 195943-00 concern point of diversion and priority date. The issue remarks on irrigation claim 43D 195944-00 concern point of diversion and maximum acres irrigated. The issue remarks on irrigation claim 43D 195945-00 concern point of diversion, priority date, and a late objection. The issue remark on irrigation claim 43D 216354-00 concerns point of diversion.

On March 15, 2019, an order granted Ken Kaufman's motion to intervene in these proceedings.

On August 20, 2019 the parties filed a Stipulation and Settlement Agreement. The stipulated terms were acceptable but did not resolve the maximum acres irrigated issue remarks on irrigation claim 43D 195944-00 noting 140.00 acres of irrigation in 1946 and 1966. On March 3, 2020, claimants filed a proposed resolution of the maximum acres irrigated issue remarks on claim 43D 195944-00.

## **Issues**

1. Should the Court accept the stipulated terms?
  - a. Modify source name, point of diversion, and place of use for stock claim 43D 195943-00.
  - b. Reduce maximum acres irrigated and place of use and add clarifying language to the conveyance information remark on irrigation 43D 195944-00.
  - c. Reduce priority date, and modify type of historical right, source, point of diversion, and means of diversion for irrigation claim 43D 195945-00.
  - d. Dismiss irrigation claim 43D 216354-00
2. Are the issue remarks on each claim resolved?

## **Findings of Fact**

1. Claim 43D 216354-00 should be dismissed from the adjudication.  
A preponderance of evidence establishes the following facts:
  2. The historically accurate source name for stock claim 43D 195943-00 is Dry Creek.
  3. The historically accurate point of diversion for stock claim 43D 195943-00 is government lots 2 and 10, and the NE of Section 1, Township 6 South, Range 20 East.
  4. The historically accurate place of use for stock claim 43D 195943-00 is the NE of Section 1, Township 6 South, Range 20 East.
  5. The historically accurate maximum number of acres irrigated and place of use for irrigation claim 43D 195944-00 is 140.00 acres.
  6. The conveyance information remark under point of diversion on irrigation claim 43D 195944-00 requires correction.
  7. The priority date for irrigation claim 43D 195945-00 is August 22, 1903.
  8. The type of historical right for irrigation claim 43D 195945-00 is “use.”
  9. The historically accurate source name for irrigation claim 43D 195945-00 is Waste and Seepage, Unnamed Tributary of Dry Creek.
  10. The historically accurate point of diversion for irrigation claim 43D 195945-00 is government lots 6, 7, and 8 of Section 1, Township 6 South, Range 20 East.

## **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. Settlement, including the documents filed by a claimant where the claimant is the only party, is subject to review and approval by the Water Court. Rule 17(a), W.R.Adj.R.

4. The Water Court may accept a settlement agreement that reduces or limits an element of a claim and need not determine whether the burden of proof is met unless there is an unresolved issue remark on the claim. Rule 17(c), W.R.Adj.R.

5. If the settlement agreement expands or enlarges an element of a claim the burden of proof must be met. If evidence does not meet the burden of proof, the element shall not be expanded or enlarged. Rule 17(b), W.R.Adj.R.

6. 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.

7. 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.

8. 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.

9. Any individual with a valid appropriation not a party to a district court decree may petition the district court to make the individual a party to the decree and establish the right in relation to the other rights in the decree. Section 89-835, RCM (1947) (repealed 1973). Failure to follow this procedure disallows an appropriator to assert a priority against any subsequent appropriator identified by the decree. Section 89-837, RCM (1947) (repealed 1973).

10. Judicial notice of facts may be taken from a source “whose accuracy cannot be reasonably questioned.” Rule 201, M.R.Ev.

11. Judicial notice of law may be taken. Rule 202, M.R.Ev.

## **Analysis**

### **Issues 1, 1a, and 2 – claim 43D 195943-00 stipulated modified source name, point of diversion, and place of use; point of diversion and priority date issue remark resolution**

The stipulated modifications for source name, point of diversion, and place of use match the map attached to statement of claim 43D 195943-00. The map is afforded *prima facie* proof and confirms the historical accuracy of the stipulated modifications.

The point of diversion issue remark gave notice to claimants and other water users that the point of diversion would remain as it appeared on the preliminary decree abstract unless objected to. Objections were filed and the parties stipulated to the historically accurate point of diversion. The stipulated modified point of diversion resolves the point of diversion issue remark.

The priority date issue remark on claim 43D 195943-00 notes the claim is a use right with a priority date postdating a district court decree for Rock Creek (Case No. 2275). With the change in source name to Dry Creek, the same issue remains. The claim postdates a district court decree for Dry Creek (Case No. 2330). The remark reflects § 89-835 of the Revised Codes of Montana (1947) (repealed 1973), governing the appropriation of junior water rights from a decreed stream. The statute allows an appropriator to petition the district court to open the decree, add the new appropriation,

and establish its relation to the other rights affected by the decree. If an appropriator fails to follow this procedure, that water right cannot be exercised against any appropriator mentioned in or bound by that decree. *See also* Section 89-837, RCM (1947) (repealed 1973). In other words, any appropriator who failed to follow these statutes would become junior to a subsequent appropriator who followed the statutes. The issue remark on claim 43D 195943-00 identifies this possibility.

On July 1, 1973, these statutes were replaced by the Montana Water Use Act. Under this act, appropriators could no longer obtain a decreed right by petitioning the district court. When the Preliminary Decree was issued for Basin 43D, the source index identified all claims from this source that have a priority date postdating the district court decree.

Judicial notice is taken of the Basin 43D Preliminary Decree source index and the district court decree for Dry Creek, Case No. 2330. A review of the source index confirms all other claims on Dry Creek with a priority date junior to claim 43D 195943-00 are either “use,” “filed,” or “B” late claims. None of the junior “use” or “filed” right appropriators petitioned the district court to be added to the Dry Creek decree. “B” late claims are subordinated to all timely filed claims.

Therefore, neither the “B” late claims nor the junior “use” or “filed” claims can assert a priority date senior to claim 43D 195943-00 based on compliance with § 89-835, RCM. As a result, the issue remark stating claim 43D 195943-00 postdates the ~~Rock~~ Dry Creek district court decree does not raise a valid issue.

### **Conclusions of law**

The stipulated modifications for source name, point of diversion, and place of use are historically accurate and should be accepted by the Court. The point of diversion and priority date issue remarks are resolved.

### **Issues 1, 1b, and 2 – claim 43D 195944-00 stipulated reduced maximum acres irrigated and place of use; point of diversion and maximum acres irrigated issue remark resolution**

The point of diversion issue remark gave notice to claimants and other water users that the point of diversion would remain as it appeared on the preliminary decree abstract

unless objected to. While objections were filed to point of diversion, the parties stipulated only to clarify the conveyance information remark language under point of diversion. The point of diversion legal land descriptions identified by the preliminary decree abstract are historically accurate. The point of diversion issue remark is resolved.

There is no burden of proof to meet if a modification to a claim is a reduction that also resolves an issue remark. Claimants requested to reduce the maximum number of acres irrigated to those identified by the DNRC claims examiner on 1946 and 1966 aerial photos. See examination worksheets signed by examiner Calcagno May 9, 1990. The requested reduction in maximum acres irrigated matches the issue remarks noting 140.00 acres irrigated in 1946 and 1966 and is below the 159.40 acres irrigated confirmed by the DNRC claims examiner on the 1980 aerial photo. The requested reduction in maximum acres irrigated resolves the maximum acres irrigated issue remarks on claim 43D 195944-00.<sup>1</sup>

### **Conclusions of law**

The stipulated modification to the conveyance information remark under point of diversion clarifies the remark. The claimants' requested reduction in the place of use is historically accurate and should be accepted by the Court. The point of diversion and maximum acres irrigated issue remarks are resolved.

### **Issues 1, 1c, and 2 – claim 43D 195945-00 stipulated modified source name, point of diversion, and means of diversion, and reduced priority date and modified type of historical right; point of diversion, priority date, and late objection issue remark resolution**

The stipulated modifications for source name and point of diversion and means of diversion match the map attached to statement of claim 43D 195945-00. The map is afforded *prima facie* proof and confirms the historical accuracy of the stipulated modifications.

The point of diversion issue remark gave notice to claimants and other water users

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<sup>1</sup> The lowest contact point for 140.00 acres irrigated is very close to the maximum number of acres irrigated found by the DNRC during issue remark resolution. Accordingly, the DNRC recommendations concerning resolution of the maximum acres irrigated issue remarks were not utilized for resolution of these case proceedings. May 2013 DNRC Water Rights Claim Examination Manual, Ch. VII.D.2.e.

that the point of diversion would remain as it appeared on the preliminary decree abstract unless objected to. Objections were filed and the parties stipulated to the historically accurate point of diversion and means of diversion. The stipulated modified point of diversion resolves the point of diversion issue remark.

There is no burden of proof to meet if a modification to a claim is a reduction that also resolves an issue remark. The parties stipulated to a reduced priority date for claim 43D 195945-00. The reduced priority date results in claim 43D 195945-00 falling behind district court decree Case No. 275, *Granite Ditch Co. v. Anderson*, Sixth Judicial District, Carbon County, signed August 21, 1903. However, with the stipulated modified source name, to Waste and Seepage, Unnamed Tributary of Dry Creek, a similar issue remains for Case No. 2330, *Hill v. Hunter*, Sixth Judicial District Carbon County, signed June 15, 1921. Judicial notice is taken of Case No. 2330. The stipulated reduced priority date predates district court decree Case No. 2330. However, the objection to priority date is resolved and the record does not indicate why this claim was not included in either Case No. 275 or Case No. 2330, Carbon County. The issue remark is not supported by evidence sufficient to overcome the priority date for this claim.

The parties stipulated modified type of historical right is based upon the stipulated reduced priority date. The modification of the claim to a use right is logical and supported by the record.

On May 5, 2008, during temporary preliminary decree proceedings, Curtis M. Schwend filed a late objection to all elements of claim 43D 195945-00. The Court added an issue remark to the claim noting Mr. Schwend's late objection. The issue remark stated the late objection would be heard after notice on the preliminary decree objection list. Mr. Schwend's objection was included on the preliminary decree objection list.

On February 4, 2019, Sue Schwend assumed the objections of Mr. Schwend. Ms. Schwend is a signatory to the stipulation thereby indicating her objections to the claim are resolved by the stipulated terms. The late objection issue remark served its notice purpose.

### **Conclusions of law**

The stipulated modifications for source name, point of diversion, means of



Irrigation claim 43D 195944-00 should be modified as follows to accurately reflect historical use.

**MAXIMUM ACRES:** 171.87 140.00

**POINT OF DIVERSION AND MEANS OF DIVERSION:**

IN ADDITION TO CONVEYANCE THROUGH THE HUNTER-RUSSETT DITCH, THIS ROCK CREEK WATER RIGHT USES DRY CREEK AS A NATURAL CARRIER. THE HUNTER-RUSSETT DITCH INTERSECTS DRY CREEK IN THE NWNENW SEC 12 T6S R20E. THE TWO DIVERSIONS OUT OF DRY CREEK ARE LOCATED IN THE NWSWSEC 1 T6S R20E AND GOVT LOT 10 NE SEC 1 T6S R20E.

**PLACE OF USE:**

	<u>ACRES</u>	<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
30.00	40.00	2	W2NE	1	6S	20E	CARBON
35.00	40.00	6	E2NW	1	6S	20E	CARBON
35.00	40.00	7	W2NE	1	6S	20E	CARBON
	40.00	8	NE	1	6S	20E	CARBON
<b>TOTAL:</b>	<b>140.00</b>						

Irrigation claim 43D 195945-00 should be modified as follows to accurately reflect historical use.

**PRIORITY DATE:** MAY 5, 1894 AUGUST 22, 1903

**TYPE OF HISTORICAL RIGHT:** FILED USE

**SOURCE NAME:** ROCK CREEK

WASTE AND SEEPAGE, UNNAMED TRIBUTARY OF DRY CREEK

**POINT OF DIVERSION AND MEANS OF DIVERSION:**

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
6	NESWSE	1 24	6S	20E	CARBON

Diversion Means: HEADGATE DITCH  
Ditch Name: HUNTER-RUSSETT DITCH

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
7	NWSWSEC	1	6S	20E	CARBON

Diversion Means: HEADGATE DITCH  
Ditch Name: HUNTER-RUSSETT/DRY-CREEK DIVERSION

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
8 40	NE	1	6S	20E	CARBON

Diversion Means: HEADGATE DITCH  
Ditch Name: HILL & VANNOY DITCH

~~THIS ROCK CREEK WATER RIGHT USES DRY CREEK AS A NATURAL CARRIER. THE HUNTER-RUSSETT DITCH INTERSECTS DRY CREEK IN THE NWNENW SEC 12 T6S R20E. THE TWO DIVERSIONS OUT OF DRY CREEK ARE LOCATED IN THE NWSESW SEC 1 T6S R20E AND GOVT LOT 10 NE SEC 1 T6S R20E.~~

The issue remarks should be removed from the abstracts of claims 43D 195943-00, 43D 195944-00, and 43D 195945-00.

Claim 43D 216354-00 should be dismissed from the adjudication.

Post Decree Abstracts of Water Right Claim are served with this Report to confirm that the above recommendations are reflected in the state's centralized record system.

DATED this 11<sup>th</sup> day of JUNE, 2020.

  
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Anna M. Stradley  
Senior Water Master

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