

Montana Water Court
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40N-0003-R-2021

December 9, 2021

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
ROCK CREEK, TRIBUTARY OF THE MILK RIVER BASIN (40N)
PRELIMINARY DECREE

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CLAIMANT: Eaton Brothers LLP

OBJECTOR: United States of America (Bureau of Land
Management)

CASE 40N-0003-R-2021
40N 168162-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's 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. If you file an objection, you must serve 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 United States of America (Bureau of Land Management) ("BLM") filed an objection to Eaton Brothers LLP irrigation claim 40N 168162-00. The objection stated federal land should be removed from the maximum acres irrigated and place of use identified by the claim.

The claim also received issue remarks concerning period of diversion, point of diversion, source, reservoir record, and ditch name. 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. Montana law requires the Water Court to resolve issue remarks.

A status conference was held to discuss the objection to the claim and the issue remarks appearing on the claim. Eaton Brothers LLP failed to attend the status conference. The BLM, with leave of court, made a motion pursuant to Rule 22, W.R.Adj.R., for claimant Eaton Brothers LLP to Show Cause why the maximum acres irrigated, and place of use identified by irrigation claim 40N 168162-00 should not be reduced to remove federal land. The court set a show cause filing deadline for Eaton Brothers LLP. Claimant did not respond by the deadline.

Issues

1. Are the reduced maximum acres irrigated and place of use requested by BLM a just sanction?
2. Are the period of diversion, point of diversion, source name, reservoir record, and ditch name notice issue remarks resolved?
3. Is the source issue remark resolved?

Findings of fact

1. The Preliminary Decree abstract for claim 40N 168162-00 identifies a 90.00-acre place of use.
2. Claim 40N 168162-00 historically irrigated an 89.00-acre place of use.

Principles of law

1. A properly filed Statement of Claim for Existing Water Right or an amended 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. The Court may grant a dispositive motion before the issuance of a hearing track Order. Rule 16(a), W.R.Adj.R.
4. 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. When a claimant fails to comply with an Order issued by the Water Court, including an order issued by a Water Master appointed by the Court, the Court upon its own initiative or upon motion, can among other actions: 1) modify the elements of the claim to conform with the information in the claim file, information obtained by the Court, or information included in an objection, or 2) terminate the claim. Rule 22, W.R.Adj.R.; *See also* Section 85-2-248(9), MCA.
5. 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.

6. 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

Issue 1 – sanction and BLM objection

There was no evidence in the record supporting the reduced maximum acres irrigated and place of use mentioned by the BLM objection and the requested sanction. Therefore, a deadline was set for the BLM to file evidence supporting the requested sanction. On August 27, 2021, the BLM filed a map and proposed abstract removing one acre from the place of use. A copy of the map is included with this report. Both the report and the map will be placed in the claim file for future reference.

Upon review of the evidence, the requested sanction appeared just. An order set a filing deadline for Eaton Brothers LLP to show cause why claim 40N 168162-00 should not be amended as proposed by the BLM. Eaton Brothers LLP failed to comply with this filing deadline.

Conclusions of law

Based upon the BLM's objection to claim 40N 168162-00, the BLM's request to amend the claim's maximum acres irrigated and place of use, the evidence filed in support of the request to amend claim 40N 168162-00, and Eaton Brothers LLP's repeated failure to comply with Orders issued by the Water Master, the requested sanction appears just. The BLM's objection is resolved.

Issue 2 – notice issue remark resolution

Irrigation claim 40N 168162-00 appeared in the Preliminary Decree with the following notice issue remarks concerning period of diversion, point of diversion, source name, reservoir record, and ditch name.

THE CLAIMANT DID NOT IDENTIFY THE PERIOD OF DIVERSION FOR THIS RIGHT. A PERIOD OF DIVERSION HAS BEEN ADDED TO MATCH THE PERIOD OF USE. IF NO OBJECTIONS ARE RECEIVED TO THE PERIOD OF DIVERSION OR PERIOD OF USE, THOSE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS ISSUE REMARK WILL BE REMOVED FROM THIS CLAIM.

POINT OF DIVERSION, SOURCE NAME, RESERVOIR RECORD, AND DITCH NAME WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

Water users were given the opportunity to review the claim and file an objection. The deadline to file objections has expired. No objections were filed against the claim.

Conclusions of law

The period of diversion, point of diversion, source name, reservoir record, and ditch name identified by the Preliminary Decree abstract are historically accurate. The notice issue remarks concerning period of diversion, point of diversion, source, reservoir record, and ditch name served their purpose.

Issue 3 – source issue remark resolution

Irrigation claim 40N 168162-00 appeared in the Preliminary Decree with the following issue remark concerning source.

THIS CLAIM APPEARS TO BE CLAIMING TWO SEPARATE SOURCES OF WATER. MORE THAN ONE WATER RIGHT MAY BE INVOLVED.

DNRC added the above issue remark after modifying the source from Bell Coulee to Bell Coulee and Cache Creek, West Fork during claims examination. (*See* claim file, October 24, 2018 letter from DNRC.)

Eaton Brothers LLP and other water users in Basin 40N were provided notice of the modifications and did not file an objection to DNRC's modification of the source, thereby signaling that the modified sources reflect the historically accurate sources for claim 40N 168162-00.

Additionally, statement of claim 40N 168162-00 identifies its source as Bell Coulee, Tributary of the West Fork of Cache Creek. Attached to the statement of claim is an aerial photo. The aerial photo identifies the sources and conveyance system claimed

by this claim. It is evident from the aerial photo that this water right diverts water from two sources as a single appropriation for irrigation.

Conclusions of law

Weighing the information resulting in the issue remark and the issue remark against the claimed water right, the sources identified by the Preliminary Decree abstract for irrigation claim 40N 168162-00 are historically accurate. Claimant, at the time of filing statements of claim, correctly filed one statement of claim for this appropriation even though multiple sources were involved. The issue remark concerning source and the possibility of two water rights is resolved.

Recommendations

Irrigation claim 40N 168162-00 should be amended as follows to accurately reflect historical use.

<u>MAXIMUM ACRES:</u>		90.00						89.00
<u>PLACE OF USE:</u>								
	<u>ACRES</u>		<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
	19.00			S2SESE	33	33N	35E	VALLEY
	30.00			E2NW	2	32N	35E	VALLEY
	<u>40.00</u>	<u>41.00</u>		SWNE	2	32N	35E	VALLEY
TOTAL:	89.00	90.00						

The issue remarks should be removed from the claim abstract.

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.

Anna M. Stradley
Senior Water Master

Service via USPS Mail

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**WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
ROCK CREEK, TRIBUTARY TO MILK RIVER
BASIN 40N**

Water Right Number: 40N 168162-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: EATON BROTHERS LLP
PO BOX 338
HINSDALE, MT 59241 0338

Priority Date: NOVEMBER 21, 1902

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

Volume: 135.00 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 90.00

Source Name: CACHE CREEK, WEST FORK

Source Type: SURFACE WATER

Source Name: BELL COULEE

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWSESE	33	33N	35E	VALLEY

Source Name: BELL COULEE

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

2		SENESE	33	33N	35E	VALLEY
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Source Name: CACHE CREEK, WEST FORK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DIVERSION DAM

Ditch Name: EATON DITCH

THE DAM EXTENDS INTO THE SESWSE SEC 33 TWP 33N 35E VALLEY COUNTY.

WATER DIVERTED AT POINT OF DIVERSION NO.2 IS CONVEYED BY EATON DITCH TO THE RESERVOIR AT POINT OF DIVERSION NO.1

Reservoir: ONSTREAM

Reservoir Name: TAYLOR DAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
S2SESE		33	33N	35E	VALLEY

Diversion to Reservoir: DIVERSION # 1

Dam Height: 8.00 FEET

Depth: 5.00 FEET

Surface Area: 11.00 ACRES

Capacity: 22.00 ACRE-FEET

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	19.00		S2SESE	33	33N	35E	VALLEY
2	30.00		E2NW	2	32N	35E	VALLEY
3	40.00		SWNE	2	32N	35E	VALLEY
Total:	89.00						

40N-168162-00

