

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

CLAIMANTS: Terri L. Ellsworth; Ralph E. Ellsworth

CASE 40N-0026-R-2021
40N 130689-00

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

Terri L. Ellsworth and Ralph E. Ellsworth ("Ellsworths") irrigation claim 40N 130689-00 appeared in the Preliminary Decree with the following issue remarks.

RESERVOIR RECORD WAS 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.

THE TYPE OF IRRIGATION SYSTEM MAYBE QUESTIONABLE. THE TYPE OF HISTORICAL IRRIGATION APPEARS TO HAVE BEEN A WATER SPREADING SYSTEM.

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 296 TIMES THE CAPACITY OF THE RESERVOIR.

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 Water Court is required to resolve issue remarks. Ellsworths completed the issue remark resolution process.

Issues

1. What is the historically accurate type of irrigation and volume?
2. Are the issue remarks resolved?
3. Should the court grant Ellsworths' motion to amend means of diversion?

Findings of fact

1. On November 15, 2018, Pam Weinmeister, Water Right Specialist with the Glasgow Regional Office of the DNRC added a Memorandum to claim file 40N 130689-00. The Memorandum included a map from the 1968 Valley County Water Resources Survey.

2. The Memorandum reported that co-claimant Ralph E. Ellsworth met with Ms. Weinmeister, prior to issuance of the Basin 40N Preliminary Decree in 2020. It appears

Mr. Ellsworth met with DNRC to attempt resolution of the issue remarks appearing on claim 40N 130689-00. The meeting resulted in confirmation that the statement of claim identified the historically accurate volume; a proposed modification to the type of irrigation, a proposed update of the flow rate information remark, removal of the reservoir record from the claim; and a proposed amendment to the means of diversion.

3. Ellsworths did not sign any document agreeing with the modifications proposed by the DNRC Memorandum. Pursuant to § 85-2-248(11), MCA the court may not resolve an issue remark modifying an element without agreement from the claimants. Therefore, a deadline was set for Ellsworths to file agreement or disagreement with the modifications proposed by the DNRC Memorandum. The order included the following language, “the failure to comply with this filing deadline will be viewed as acknowledgment that the changes proposed by the DNRC Memorandum are necessary to accurately reflect the historical use of claim 40N 130689-00.” The Ellsworths did not file any statement with the court by the deadline, thereby signaling their agreement with the modifications proposed by the DNRC Memorandum.

4. A preponderance of evidence establishes the historically accurate irrigation type is Water Spreading and the means of diversion is Diversion Dam.

5. The modified irrigation type from Flood to Water Spreading results in an updated flow rate information remark and removal of the reservoir record from the claim.

6. The Preliminary Decree abstract identifies the historically accurate volume, 1,184.00 AF.

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 Montana 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. Notice by publication of an amendment is required if there is the possibility of adverse affect to other water users. Section 85-2-233(6), MCA.

9. Rule 15, M.R.Civ.P., restricts the scope of an amendment to the conduct, transaction, or occurrence set forth in the original pleading - the “same set of operative facts as contained in the original pleading.” *Sooy v. Petrolane Steel Gas, Inc.*, 218 Mont. 418, 422-423, 708 P.2d 1014, 1017 (1985). The requested amendment “merely makes more specific that which has already been alleged.” *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15, 504 P.2d 277, 281 (1972).

10. The party seeking to amend a water right claim has the burden to show, by a

preponderance of the evidence, that the claim elements they challenge do not accurately reflect the beneficial use of the water rights as they existed prior to July 1, 1973. *Nelson v. Brooks*, 2014 MT 120, ¶34, 375 Mont. 86, 329 P.3d 558; Rule 19, W.R.Adj.R.

Analysis

Issues 1 - 3 – type of irrigation and volume; issue remark resolution; motion to amend means of diversion

Statement of claim 40N 130689-00 and the map attached to the statement of claim identified ditch as the means of diversion and the type of irrigation as flood. The statement of claim stated that the water was “diverted by ditch to Halbert Coulee.” DNRC modified the means of diversion during claims examination from ditch to dam without explanation.

Ms. Weinmeister reviewed the 1968 Valley County Water Resources Survey and visited with co-claimant Ralph E. Ellsworth. Mr. Ellsworth explained the system never stored water. Rocks were placed in Whitebread Coulee, and when water was available in the coulee, the rocks diverted water into a ditch and then into Halbert Coulee where it continued into dikes and spread out over the place of use. The 1968 Valley County Water Resources Survey map included with the DNRC Memorandum confirmed the historical accuracy of the conveyance system and type of irrigation described by Mr. Ellsworth.

The Ellsworths’ proposed amended means of diversion arises out of the same conduct, transaction, or occurrence specified on the original statement of claim, and is based on the same operative facts specified in the statement of claim. The Amendment and evidence in support of the Amendment, namely the Valley County Water Resources Survey map, are sufficient to support the historical accuracy of the amended means of diversion proposed by Ellsworths.

The Amendment results in a refinement of the means of diversion. The Amendment does not have the possibility to adversely affect other water users. No public notice of the Amendment is required.

Conclusions of law

The evidence in the claim file and Ellsworths' agreement with the modifications proposed by the DNRC Memorandum result in the identification of the historically accurate irrigation type and means of diversion, overcome by a preponderance of evidence the prima facie proof afforded the statement of claim where necessary, justify the modifications to the claim, confirm the historical accuracy of the volume identified by the claim, and resolve the issue remarks on the claim.

Ellsworths' Amendment identifies the historically accurate means of diversion for irrigation claim 40N 130689-00. Ellsworths' Amendment should be granted.

Recommendations

Irrigation claim 40N 130689-00 should be modified as follows to accurately reflect historical use.

PURPOSE (USE): IRRIGATION

IRRIGATION TYPE: ~~FLOOD~~

WATER SPREADING

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

A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FLOW WATER SPREADING.

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> |
|-----------------|----------------|------------|------------|------------|---------------|
| | NESWSW | 12 | 31N | 36E | VALLEY |

Diversion Means: ~~DAM~~

DIVERSION DAM

Reservoir: ~~ONSTREAM~~ **Reservoir Name:** ~~WHITEBREAD COULEE~~

| <u>GOVT LOT</u> | <u>QTR SEC</u> | <u>SEC</u> | <u>TWP</u> | <u>RGE</u> | <u>COUNTY</u> |
|-----------------|----------------|------------|------------|------------|---------------|
| | NESWSW | 12 | 31N | 36E | VALLEY |

Diversion to Reservoir: ~~DIVERSION # 1~~

Dam Height: ~~8.00 FEET~~

Depth: ~~5.00 FEET~~

Surface Area: ~~2.00 ACRES~~

Capacity: ~~4.00 ACRE FEET~~

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:

Terri L. Ellsworth
Ralph E. Ellsworth
540 FAS 537 Hwy
Hinsdale, MT 59241

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

Water Right Number: 40N 130689-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: RALPH E ELLSWORTH
540 FAS 537 HWY
HINSDALE, MT 59241

TERRI L ELLSWORTH
540 FAS 537 HWY
HINSDALE, MT 59241

***Priority Date:** MAY 20, 1903

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: WATER SPREADING

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE
CONSISTS OF DIRECT FLOW WATER SPREADING.

Volume: 1,184.00 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 592.00

Source Name: UNNAMED TRIBUTARY OF ROCK CREEK

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 | | NESWSW | 12 | 31N | 36E | VALLEY |

***Period of Diversion:** JANUARY 1 TO DECEMBER 31

Diversion Means: DIVERSION DAM

Period of Use: MARCH 1 TO OCTOBER 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 | 118.00 | | NW | 14 | 31N | 36E | VALLEY |
| 2 | 45.00 | | NE | 14 | 31N | 36E | VALLEY |
| 3 | 22.00 | | SE | 14 | 31N | 36E | VALLEY |
| 4 | 95.00 | | SW | 14 | 31N | 36E | VALLEY |
| 5 | 71.00 | | N2NE | 15 | 31N | 36E | VALLEY |
| 6 | 40.00 | | SENE | 15 | 31N | 36E | VALLEY |
| 7 | 104.00 | | SE | 15 | 31N | 36E | VALLEY |
| 8 | 7.00 | | SW | 15 | 31N | 36E | VALLEY |
| 9 | 50.00 | | E2NW | 22 | 31N | 36E | VALLEY |

| | |
|---------------|---------------|
| 10 | 40.00 |
| Total: | 592.00 |

W2NE 22 31N 36E VALLEY