

Montana Water Court
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40N-0070-R-2021

December 22, 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

* * * * *

CLAIMANT: Carroll MT Properties LLC

OBJECTOR: Carroll MT Properties LLC

CASE 40N-0070-R-2021

40N 30125940

40N 30138562

40N 30138565

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 above captioned stock claims received an objection from claimant Carroll MT Properties LLC. Carroll MT Properties LLC asserts the point of diversion and place of use identified by statement of claim 40N 30125940 are historically accurate, and the priority date identified by statements of claim 40N 30138562 and 40N 30138565 is historically accurate.

Each claim received an issue remark noting lack of the claims' inclusion in the previous decree.

Montana law requires the Water Court to resolve objections and issue remarks.

Issues

1. What is the historically accurate point of diversion and place of use for claim 40N 30125940?
2. What is the historically accurate priority date for claims 40N 30138562 and 40N 30138565?
3. Is the notice issue remark appearing on the claims resolved?

Findings of fact

1. Statement of claim 40N 30125940 identifies the historically accurate point of diversion and place of use for the claim. The point of diversion and place of use identified by the Preliminary Decree abstract for the claim should be modified to match statement of claim 40N 30125940.

2. Statements of claim 40N 30138562 and 40N 30138565 identify the historically accurate priority date for each claim, January 1, 1955. The priority date identified by the Preliminary Decree abstracts for claims 40N 30138562 and 40N 30138565 should be modified to match each statement of 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. 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. 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.

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.

7. For groundwater appropriated prior to January 1, 1962, claimants had the option to file a declaration for their water right by January 1, 1966. Claimants who filed a water well log form were deemed to comply with this optional requirement. Section 89-2913(h), RCM (1965) (repealed 1973). Properly filed well log forms were prima facie evidence of the statements made therein. Section 89-2913(h), RCM (1965) (repealed 1973).

However, this statutory framework did not mandate the forfeiture of a water right or the inadmissibility of a water well log as evidence of a water right if the statutory framework was not followed. *Cf. Lee E. Foss v. United States of America (USDA-Forest Service)*, Case 76HF-580 at p.8-9, (MT Water Court Order Amending and Adopting Master’s Report as Amended for Claims 76H 105034-00 and 76H 105055-00 Regarding Admissibility of Notices of Appropriation Jun. 4, 2013).

The current rules of evidence should apply to the introduction of water well logs that do not comply with the filing provisions of section 89-2913(h), the “weight and ultimate value should be measured like any other document before the Court.” *Cf. Lee E. Foss*, 2013 Mont. Water LEXIS 17 at ** 11, 28-29 (Jan.31, 2013).

Analysis

Issue 1 – point of diversion and place of use, claim 40N 30125940

Statement of claim 40N 30125940 and the map attached to the statement of claim match each other, and the first claims examination completed by DNRC. The point of diversion and place of use modified by DNRC during a second round of claims examination should be modified to match the prima facie point of diversion and place of use identified by statement of claim 40N 30125940.

Conclusions of law

Carroll MT Properties LLC’s objection along with the evidence in the claim file confirms the prima facie proof afforded the point of diversion and place of use identified by statement of claim 40N 30125940, justifies the modified point of diversion and place of use, and resolves Carroll MT Properties LLC’s objection to the claim.

Issue 2 – priority date, claims 40N 30138562 and 40N 30138565

Attached to each statement of claim is a Montana Well Log report on record with the Montana Bureau of Mines and Geology. A DNRC claims examiner included a copy of a Declaration of Vested Groundwater Rights in each claim file. *See* attachments to November 26, 2019 letter in claim files. The declarations were filed with the Valley County Clerk and Recorder. The well log was not filed with the Valley County Clerk and Recorder.

While a declaration or a water well log filed with the county clerk and recorder's office for groundwater appropriated prior to January 1, 1962 complied with the optional filing requirement of the 1961 Ground Water Code and provided prima facie evidence of the claimed priority date, the failure to file a declaration or water well log for groundwater appropriated prior to January 1, 1962, with the county clerk and recorder's office did not result in forfeiture of a claim.

Each declaration identifies a stock well in the claimed location for a well completed in 1955. Each water well log identifies a stock well in the claimed location completed on January 1, 1955.

The declarations, while properly filed and entitled to prima facie evidence of their contents, identify a general priority date of 1955. The water well log identifies a more specific date of first beneficial use than the declarations. Therefore, claims 40N 30138562 and 40N 30138565 should identify the same priority date as the water well log and the prima facie priority date identified by the statements of claim, January 1, 1955.

Conclusions of law

Carroll MT Properties LLC's evidence along with the evidence in the claim file confirms the prima facie proof afforded the priority date identified by statements of claim 40N 30138562 and 40N 30138565, justifies the modified priority date, and resolves Carroll MT Properties LLC's objection to each claim.

Issue 3 – notice issue remark, all claims

The stock claims in this case are existing rights for groundwater or instream flow. The claims meet the definition of an "exempt claim." Section 85-2-222(1), MCA. In 2013 and 2017, the Montana Legislature amended § 85-2-222, MCA, and provided for the filing of exempt claims subject to specified terms and conditions. These claims are timely filed exempt claims.

Each of the claims appeared in the Preliminary Decree with the following issue remark:

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 40N DECREE ISSUED 08/13/1985.

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

Conclusion of law

The referenced notice issue remark served its purpose.

Recommendations

Stock claim 40N 30125940 should be modified as follows to accurately reflect historical use.

POINT OF DIVERSION AND PLACE OF USE:

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
NWNE	SWNE	3	35N	37E	VALLEY
NENW	NENE	3 40	35N	37E	VALLEY
E2NE	SENE	10	35N	37E	VALLEY
	SE	10	35N	37E	VALLEY

Stock claims 40N 30138562 and 40N 30138565 should be modified as follows to accurately reflect historical use.

PRIORITY DATE: ~~DECEMBER 31, 1955~~ **JANUARY 1, 1955**

The notice issue remark should be removed from the claim abstracts.

Post Decree Abstracts of Water Right Claim accompany 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 Electronic Mail

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

Water Right Number: 40N 30125940 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: CARROLL MT PROPERTIES LLC
PO BOX 1549
BOONE, NC 28607 1549

Priority Date: AUGUST 21, 1919

Type of Historical Right: USE

Purpose (Use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: UNNAMED TRIBUTARY OF DEEP CREEK

Source Type: SURFACE WATER

Source Name: DEEP CREEK

Source Type: SURFACE WATER

THE SOURCE INCLUDES UNNAMED TRIBUTARIES OF DEEP CREEK.

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWNE	3	35N	37E	VALLEY
Source Name: UNNAMED TRIBUTARY OF DEEP CREEK						
Period of Diversion: APRIL 1 TO SEPTEMBER 30						
Diversion Means: LIVESTOCK DIRECT FROM SOURCE						
2		NENW	3	35N	37E	VALLEY
Source Name: DEEP CREEK						
Period of Diversion: APRIL 1 TO SEPTEMBER 30						
Diversion Means: LIVESTOCK DIRECT FROM SOURCE						
3		E2NE	10	35N	37E	VALLEY
Source Name: DEEP CREEK						
Period of Diversion: APRIL 1 TO SEPTEMBER 30						
Diversion Means: LIVESTOCK DIRECT FROM SOURCE						

4 SE 10 35N 37E VALLEY

Source Name: DEEP CREEK

Period of Diversion: APRIL 1 TO SEPTEMBER 30

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: APRIL 1 TO SEPTEMBER 30

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			NWNE	3	35N	37E	VALLEY
2			NENW	3	35N	37E	VALLEY
3			E2NE	10	35N	37E	VALLEY
4			SE	10	35N	37E	VALLEY

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

Water Right Number: 40N 30138562 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: CARROLL MT PROPERTIES LLC
PO BOX 1549
BOONE, NC 28607 1549

Priority Date: JANUARY 1, 1955

Type of Historical Right: FILED

Purpose (Use): STOCK

Flow Rate: 10.00 GPM

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: GROUNDWATER

Source Type: GROUNDWATER

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		NENW	13	33N	36E	VALLEY

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

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			NENW	13	33N	36E	VALLEY

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

Water Right Number: 40N 30138565 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: CARROLL MT PROPERTIES LLC
PO BOX 1549
BOONE, NC 28607 1549

Priority Date: JANUARY 1, 1955

Type of Historical Right: FILED

Purpose (Use): STOCK

Flow Rate: 10.00 GPM

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: GROUNDWATER

Source Type: GROUNDWATER

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		SESWNE	31	34N	37E	VALLEY

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

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			SESWNE	31	34N	37E	VALLEY