

Montana Water Court
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41H-0043-R-2021

December 17, 2021

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
GALLATIN RIVER BASIN (41H)
PRELIMINARY DECREE

CLAIMANTS: David Richards Childrens Tr 1977; Dos Perros
LLC; 3 Drakes & A Hen LLC

OBJECTOR: Dos Perros LLC

CASE 41H-0043-R-2021
41H 107322-00
41H 107324-00
41H 107326-00

ORDER ON MOTION TO AMEND

Claimants David Richards Childrens Trust – 1977, Dos Perros LLC, and 3 Drakes & A Hen LLC (“Claimants”) and objector Dos Perros LLC (“Dos Perros”) filed a “Statement to Resolve Issue Remarks and Motion to Amend” (“Statement”) to resolve the issue remarks and objections for the water right claims in this case.

BACKGROUND

A. Procedural Background.

The Water Court included claims 41H 107322-00, 41H 107324-00, and 41H 107326-00 in the Preliminary Decree for the Gallatin River Basin (Basin 41H) issued on October 11, 2018. The abstract for each claim includes issue remarks resulting from the Department of Natural Resources and Conservation (“DNRC”) examination of the claims.

The Court originally consolidated the claims in case 41H-0029-P-2020, but later reconsolidated them into this case. Dos Perros self-objected to all three claims. No one else filed objections or appearances. The Statement seeks to resolve the issue remarks and objections by providing information responsive to the issue remarks for claims 41H 107322-00 and 41H 107326-00, by withdrawing claim 41H 107324-00, and by requesting certain amendments to claim 41H 107326-00.

B. Factual Background.

As set forth in the Preliminary Decree claim 41H 107322-00 is a claimed use right to use water from Hayes Creek for stock water use with a December 31, 1917 priority date. Hayes Creek is a stream in Gallatin County, northeast of Belgrade. The claim originally was filed on Reese Creek by claimants' predecessors, but DNRC modified the source to Hayes Creek, which is how it appeared in the Preliminary Decree.

Claim 41H 107326-00 is a claimed decreed right to use water from Hayes Creek for irrigation use with a June 20, 1867 priority date. Claim 41H 107324-00 also is a claimed decreed right to use water from Hayes Creek for irrigation use with the same June 20, 1867 priority date. The combined flow rates of the two claims from the same source with the same priority date led to the decree exceeded remarks on the Preliminary Decree abstracts.

ISSUES

Does the information provided in the Statement and the motion to amend resolve the issue remarks and objections?

DISCUSSION

A. Decree Exceeded Remark.

The Preliminary Decree abstract for claims 41H 107324-00 and 41H 107326-00 include the following decree exceeded issue remark:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 140 MINER'S INCHES DECREED IN CASE NO. 3783, GALLATIN COUNTY. 41H 107324-00, 41H 107326-00

The Statement proposes to resolve this remark by withdrawing claim 41H 107324-00.¹ The withdrawal resolves this issue remark.

B. Source Name Remarks.

The Preliminary Decree abstracts for all three claims include the following source name issue remark:

SOURCE NAME 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.

1. Claim 41H 107322-00 Source Name.

The Preliminary Decree abstract for claim 41H 107322-00 identifies the source as Hayes Creek. The Statement indicates the parties do not dispute this source name even though it was modified from Reese Creek to Hayes Creek by DNRC. The source name issue remark is resolved as to claim 41H 107322-00.

2. Claim 41H 107324-00 Source Name.

The withdrawal of claim 41H 107324-00 moots the remark as to that claim.

3. Claim 41H 107326-00 Source Name.

The Preliminary Decree identifies Hayes Creek as the source for claim 41H 107326-00. The Statement contends the proper source is North Cottonwood Creek. The parties move to amend the source name from Hayes Creek to North Cottonwood Creek. North Cottonwood Creek is a tributary of Reese Creek that flows out of the Bridger Range east of Hayes Creek.

Motions to amend are authorized under § 85-2-233(6), MCA and Rule 10, W.R.Adj.R. When a party seeks to amend an element of their own water right, the party must prove by a preponderance of the evidence that the modification overcomes the

¹ The Statement says a withdrawal of claim 41H 107324-00 will be submitted separately. (Doc. 12.00 at 4). Although a separate withdrawal has not been filed, the Court accepts the representation made in the Statement as an effective withdrawal of the claim.

prima facie status of the claim. Rule 19, W.R.Adj.R.; *Nelson v. Brooks*, 2014 MT 120, ¶ 34, 375 Mont. 86, 329 P.3d 558. If the Court determines the proposed modification may adversely affect other water users, the Court requires notice and the opportunity to object before approving the modification. Section 85-2-233(6), MCA.

As it did with claim 41H 107322-00, DNRC modified the source for claim 41H 107326-00. The original statement of claim identifies the source as North Cottonwood Creek. North Cottonwood Creek also was the identified source in the Basin 41H temporary preliminary decree. The motion to amend seeks to restore the source name to what was claimed and previously decreed. Because a statement of claim or an amended is “prima facie proof of its content,” the parties’ motion to amend the claim back to its pre-Preliminary Decree status does not have a high evidentiary burden. Section 85-2-227, MCA. Moreover, the parties filed supporting evidence in the form of identifying the claimed right as part of the 140 miner’s inch right decreed to Eliza Eukes and George Beckhorn in the case 3783 decree entered by the district court on December 26, 1908.

No notice is required because the objection filed by Don Perros identifies source name as part of its objection. The Preliminary Decree objection list therefore provides satisfies any notice requirement imposed by § 85-2-233(6), MCA. *See Bergtoll v. United States (Bureau of Reclamation)*, 2021 Mont. Water LEXIS 664, *27 (“[w]hen claims are amended following a preliminary decree, the Court applies this statute against the backdrop of notice that was provided in the decree”).

C. Priority Date Remark.

The Preliminary Decree abstract for claim 41H 107322-00 includes the following priority date issue remark:

THE PRIORITY DATE MAY BE QUESTIONABLE. THIS CLAIM IS FOR A USE RIGHT ON REESE CREEK WITH A PRIORITY DATE PREDATING CASE NO. 6429, GALLATIN COUNTY.

The parties do not contest the Preliminary Decree modification of the source for claim 41H 107322-00 from Reese Creek to Hayes Creek. Accepting Hayes Creek as the decreed source resolves this issue remark. DNRC did not identify a similar issue with

district court decree on Hayes Creek. Likewise, other than the Dos Perros self-objection, no third party objected to the priority date for claim 41H 107322-00 even though the Preliminary Decree provided notice of both the priority date and the source.

D. *Flow Rate Issue Remark.*

The Preliminary Decree abstract for claim 41H 107326-00 includes the following flow rate issue remark:

THE CLAIMED FLOW RATE EXCEEDS THE 17 GPM PER ACRE GUIDELINE AND CANNOT BE CONFIRMED DUE TO LACK OF DATA. THE FLOW RATE EQUALS 20.00 GPM PER ACRE.

In response to this remark, the Statement notes that the decreed flow rate is the same as what the district court decreed. The Statement provides evidence in the form of special interrogatories answered by the jury that make factual findings as to the ditch capacity and flow rate.

ORDER

Therefore, it is ORDERED:

1. Claim 41H 107324-00 is DISMISSED.
2. The motion to amend claim 41H 107326-00 is GRANTED.
3. All issue remarks and objections are resolved as provided in this Order.
4. This case is CLOSED.

Stephen R. Brown
Associate Water Judge

Service via Electronic Mail:

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**WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
GALLATIN RIVER
BASIN 41H**

Water Right Number: 41H 107322-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: DAVID RICHARDS CHILDRENS TR 1977
%RICHARDS DAVID M TRUSTEE
PO BOX 3111
BOZEMAN, MT 59772 3111

DOS PERROS LLC
PO BOX 3111
BOZEMAN, MT 59772 3111

Priority Date: DECEMBER 31, 1917

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: HAYES 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		NE	9	1N	5E	GALLATIN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

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			NE	9	1N	5E	GALLATIN

**WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
GALLATIN RIVER
BASIN 41H**

Water Right Number: 41H 107324-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: **DISMISSED**

Owners:

3 DRAKES & A HEN LLC
PO BOX 3111
BOZEMAN, MT 59772 3111

DAVID RICHARDS CHILDRENS TR 1977
%RICHARDS DAVID M TRUSTEE
PO BOX 3111
BOZEMAN, MT 59772 3111

DOS PERROS LLC
PO BOX 3111
BOZEMAN, MT 59772 3111

Priority Date:

Enforceable Priority Date:

Type of Historical Right:

Purpose (Use): IRRIGATION

Flow Rate:

Volume:

Source Name: HAYES CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

**WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
GALLATIN RIVER
BASIN 41H**

Water Right Number: 41H 107326-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: 3 DRAKES & A HEN LLC
PO BOX 3111
BOZEMAN, MT 59772 3111

DAVID RICHARDS CHILDRENS TR 1977
%RICHARDS DAVID M TRUSTEE
PO BOX 3111
BOZEMAN, MT 59772 3111

DOS PERROS LLC
PO BOX 3111
BOZEMAN, MT 59772 3111

Priority Date: JUNE 20, 1867

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 3.50 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 80.00

Source Name: NORTH COTTONWOOD 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		NWSWSW	3	1N	5E	GALLATIN

Period of Diversion: MAY 1 TO OCTOBER 31

Diversion Means: HEADGATE

Period of Use: MAY 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	30.00		SWSW	3	1N	5E	GALLATIN
2	16.00		SESE	4	1N	5E	GALLATIN
3	8.00		SWSE	4	1N	5E	GALLATIN
4	16.00		NENW	9	1N	5E	GALLATIN
5	10.00		NWNW	9	1N	5E	GALLATIN
Total:	80.00						

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

107325-00

107326-00