

41G-0177-R-2021

July 22, 2021

Montana Water Court

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

* * * * *

CLAIMANT: ~~Ganel G. Given~~; **Wade Given**

OBJECTOR: ~~Ganel G. Given~~; **Wade Given**

CASE 41G-0177-R-2021

41G 197240-00

Implied Claim:
41G 30151590

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 this Master's 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 this Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules requires written objections to a Master's Report be filed within 10 days of the date of the Master's Report. Because this Master's Report was mailed to you, Rule 6(d) of the Montana Rules of Civil Procedure provides an additional 3 days to the 10-day objection period.

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 this 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

Water right claim 41G 197240-00 appeared in the Preliminary Decree for the Jefferson River Basin (Basin 41G) issued February 15, 2018. The claim received an objection from then claimant Ganel Given and issue remarks. Issue remarks are notations identifying potential legal or factual issues with water rights and are typically placed on claims by the Department of Natural Resources and Conservation (DNRC) during preparation of the Preliminary Decree. The claim was consolidated into case 41G-0177-R-2020 to resolve the issue remarks.

FINDINGS OF FACT

1. Claim 41G 197240-00 is an irrigation claim for use in the SWNE of Section 1, T2S, R6W, Madison County, based on water decreed to Augusta Blackman in Case 857, Madison County.

2. The Claimant's predecessors, Richard and Regina Given, filed the Statement of Claim for claim 41G 197240-00 on April 30, 1982, and listed a 40 miner's inch flow rate a of June 1, 1869 priority date. The original claimants attached an excerpt of Case 857 to their Statement of Claim showing two irrigation rights from Cherry Creek decreed to Augusta Blackman: 12 miner's inches with a June 1, 1869 priority date and 40 miner's inches with a June 1, 1885 priority date.

3. During its verification process, the DNRC noted that the flow rate and priority date claimed did not match either of the Blackman decreed rights. During its adjudication of the Bain 41G Temporary Preliminary Decree, the Water Court called the claim in on motion to address the issue. The issue was not resolved, and the claim appeared in the Preliminary Decree with a June 1, 1869 priority date, a 1 CFS (40 MI) flow rate, and the following issue remark:

THE WATER COURT CANNOT DECREE THIS RIGHT WITHOUT FURTHER
PRESENTATION OF EVIDENCE CONCERNING THE PRIORITY DATE AND FLOW
RATE OF THIS WATER RIGHT.

4. On May 28, 2021, Counsel for Ganel Given and Wade Given filed a motion to substitute Wade Given as the claimant in this matter as his sister, Ganel, has passed away. The Motion to Substitute Parties is supported by a May 26, 2021 Deed of

Distribution and May 26, 2021 Grant Deed conveying the property to which this water right is appurtenant to Wade Given.

5. On June 2, 2021, claimant Wade Given filed his Verified Motion to Amend and Request for Implied Claim (Motion to Amend) and supporting evidence, requesting the modifications described below.

Claim 41G 197240-00:

6. The Motion to Amend requests that the flow rate of claim 41G 197240-00 be reduced as follows to reflect the 12 MI (134.64 GPM) June 1, 1869 Augusta Blackman right:

Flow Rate: ~~1 CFS~~ **134.64 GPM**

Implied Claim 41G 30151590:

7. The Motion to Amend then requests that an implied claim be created to reflect the 40 MI (1CFS) June 1, 1885 Augusta Blackman right, which was also attached to the Statement of Claim.

8. Implied claim 41G 30151590 should have the same elements as claim 41G 197240-00, except the following:

Priority Date: **June 1, 1885**

Flow Rate: **1 CFS**

9. Water Resource Survey Notes dated September 9, 1953 support that both Augusta Blackman rights have been historically used on the place of use. The Court is not aware of any other water user claiming the water decreed to Augusta Blackman from Cherry Creek in Case 857.

10. The claim also received an issue remark providing notice that the DNRC modified the point of diversion during its review in preparation of the Preliminary Decree (notice-type remark). The remark states that if no objections are filed, the point of diversion will remain unchanged and the issue remark will be removed. Claimant Ganel Given objected to the water right's point of diversion, however, the Motion to Amend does not request a modification to the point of diversion, and nothing before the Court suggests the point of diversion is incorrect as it appeared in the Preliminary Decree.

PRINCIPLES OF LAW

1. A statement of claim for an existing water right or an amended claim of an existing right constitutes prima facie proof of its content until the issuance of a final decree. § 85-2-227(1), MCA. Anyone seeking to modify a claim or amended claim has the burden of showing by a preponderance of the evidence that the elements of the claim are incorrect. Preponderance of the evidence is a relatively modest standard that requires a party to prove the existence of a particular fact is more probable than not. *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 248 P.3d 628. This is the applicable burden of proof for every assertion that a claim is incorrect, regardless of whether the party seeking the modification is an adverse party or the claimant objecting to its own claim. Rule 19 W.R.Adj.R.; *Nelson v. Brooks*, 2014 MT 120, ¶ 34, 375 Mont. 86, 329 P.3d 558.

2. The Water Court recognizes implied claims where a claimant can prove that: (1) the claimant's original statement of claim and attached documentation indicate the existence of two or more water rights; (2) historic use corroborates the implied claim; and (3) the court's recognition of the implied claim will not alter historic water use or increase the historic burden to other water users. *Claimants: Lee E. Foss*, 2013 Mont. Water LEXIS 17, *32; *In re Tucker*, 2019 Mont. Water LEXIS 59, *2-3. The water court requires claimants to meet this three-pronged test to ensure that claimants are not circumventing Montana's forfeiture statutes or seeking to unlawfully enlarge the elements of their claim. Order Amending and Adopting Master's Report, Water Court Case 40A-115, at ¶¶ 4-7 (June 28, 2004).

3. Water rights transfer with the conveyance of real property unless specifically reserved in an instrument of conveyance. *Guenther v. Guenther*, 2019 Mont. Water LEXIS 106, *11 (citing § 85-2-403(1), MCA; *Adams v. Chilcott*, 182 Mont. 511, 518, 597 P.2d 1140, 1145 (1979); *MacLay v. Missoula Irrigation Dist.*, 90 Mont. 344, 3 P.2d 286 (1931)).

4. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

CONCLUSIONS OF LAW

1. Wade Given's Motion to Substitute is granted. The place of use to which the claim is appurtenant was transferred to Wade Given on May 26, 2021. The water right claim transferred with ownership of the property. Mr. Given should be updated as the owner of the claim in the state's water right database and the claimant in this matter.

2. Two decreed Augusta Blackman rights appear on the face of the Statement of claim and its attachments. The evidence supports that these rights have historically been used on the place of use. Recognizing the second Blackman right does not alter historical water use or increase the burden on other users. The evidence supports a reduction of the flow rate of claim 41G 197240-00 to reflect the 1869 Blackman right, and the creation of implied claim 41G 30151590 to reflect the 1885 Blackman right. The "presentation of evidence" issue remark has been addressed and is resolved.

3. Ganel Given's objection to point of diversion should be dismissed as Ms. Given is deceased and her successor's Motion to Amend does not request a modification to the point of diversion. The notice-type issue remark does not raise unresolved issues or require further proceedings. It has served its notice purpose and can be removed from the claim.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court reduce the flow rate of claim 41G 197240-00 to 134.64 GPM, correct ownership of that claim to Wade Given, create implied claim 41G 30151590 as described in Finding of Fact No. 8 above, and remove the issue remarks from the above-captioned claim.

A post-decree abstract of each water right claim reflecting the recommended changes is attached to this Report.

Eyvind Ostrem
Water Master

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Note: Caption Updated 7.15.21

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
JEFFERSON RIVER
BASIN 41G**

Water Right Number: 41G 197240-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: WADE GIVEN
3323 NORTH 47TH ST
PHOENIX, AZ 85018

Priority Date: JUNE 1, 1869

Type of Historical Right: DECREEED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 134.64 GPM

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

Climatic Area: 3 - MODERATE

Maximum Acres: 28.00

Source Name: CHERRY 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		SEENW	1	2S	6W	MADISON

Period of Diversion: APRIL 1 TO DECEMBER 1

Diversion Means: HEADGATE

2		NWSWNE	1	2S	6W	MADISON
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Period of Diversion: APRIL 1 TO DECEMBER 1

Diversion Means: HEADGATE

Period of Use: APRIL 1 TO DECEMBER 1

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	28.00		SWNE	1	2S	6W	MADISON

Total: 28.00

Remarks:

IMPLIED CLAIM NO. 41G 30151590 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
JEFFERSON RIVER
BASIN 41G**

Water Right Number: **41G 30151590** STATEMENT OF CLAIM

Version: 1 -- ORIGINAL RIGHT

Status: ACTIVE

Owners: WADE GIVEN
3323 NORTH 47TH ST
PHOENIX, AZ 85018

Priority Date: JUNE 1, 1885

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 1.00 CFS

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

Climatic Area: 3 - MODERATE

Maximum Acres: 28.00

Source Name: CHERRY 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		SENENW	1	2S	6W	MADISON

Period of Diversion: APRIL 1 TO DECEMBER 1

Diversion Means: HEADGATE

2		NWSWNE	1	2S	6W	MADISON
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Period of Diversion: APRIL 1 TO DECEMBER 1

Diversion Means: HEADGATE

Period of Use: APRIL 1 TO DECEMBER 1

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	28.00		SWNE	1	2S	6W	MADISON

Total: 28.00

Remarks:

THIS IMPLIED CLAIM WAS AUTHORIZED BY THE WATER COURT BASED ON INFORMATION IN CLAIM NO.
41G 197240-00.