

Montana Water Court  
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43D-0550-R-2021

September 3, 2021

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
YELLOWSTONE DIVISION  
CLARKS FORK YELLOWSTONE RIVER BASIN (43D)  
PRELIMINARY DECREE

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CLAIMANTS: Josephine M. Crosby; Rodney W. Crosby

CASE 43D-0550-R-2021  
43D 187860-00

**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 the 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 the Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules requires written objections to the Master's Report must be filed within 10 days of the date of the Master's Report. Because the 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. This means your objection must be received no later than **13 days** from the above stamped date.

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 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**

Stock claim 43D 187860-00 appeared in the Preliminary Decree with the following issue remarks:

THE DAM'S LEGAL LAND DESCRIPTION APPEARS TO BE INCORRECT. THE DAM'S LEGAL LAND DESCRIPTION APPEARS TO BE IN THE NENWSE SEC 19 TWP 9S RGE 24E CARBON COUNTY.

THE PLACE OF USE APPEARS TO BE INCORRECT. THE PLACE OF USE APPEARS TO BE IN THE NENWSE SEC 19 TWP 9S RGE 24E CARBON COUNTY.

THE POINT OF DIVERSION APPEARS TO BE INCORRECT. THE POINT OF DIVERSION APPEARS TO BE IN THE NENWSE SEC 19 TWP 9S RGE 24E CARBON COUNTY.

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.

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. Claimants, Josephine M. Crosby and Rodney W. Crosby ("Crosbys") failed to complete the issue remark resolution process. The court set a show cause filing deadline for the Crosbys.

### **Issues**

The Preliminary Decree abstract identifies a point of diversion, dam, and place of use located in the NWNESE of Section 19, Township 9 South, Range 24 East, Carbon County and a year-round period of diversion.

1. What are the historically accurate point of diversion, dam location, and place of use?

2. Are the point of diversion, dam location, and place of use issue remarks resolved?

3. What is the historically accurate period of diversion?

4. Is the notice issue remark concerning period of diversion resolved?

### **Findings of fact**

A preponderance of evidence establishes the historically accurate point of diversion, dam location, and place of use for stock claim 43D 187860-00 is the NENWSE of Section 19, Township 9 South, Range 24 East, Carbon County.

A preponderance of evidence establishes the historically accurate period of diversion is year-round.

### **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. 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. 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.

4. 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.

5. 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. If a claimant fails to comply with an Order issued by the Court in its review of issue remarks, the Court may amend the claim to conform with information found in the claim file and information before the Court. Section 85-2-248(9)(a),(b), MCA.

## **Analysis**

### **Issues 1 and 2 – point of diversion, dam location, and place of use; issue remark resolution**

The point of diversion, dam location, and place of use issue remarks could not be resolved based upon information in the claim file. Accordingly, as provided for in § 85-2-248(3), MCA, Crosbys were ordered to file a statement with the court agreeing or disagreeing with the modified point of diversion, dam location, and place of use suggested by the issue remarks. Crosbys failed to file a statement by the deadline.

An order was issued setting a deadline for Crosbys to show cause why claim 43D 187860-00 should not be amended as suggested by the point of diversion, dam location, and place of use issue remarks to resolve the issue remarks. Crosbys also failed to comply with this filing deadline.

Crosbys' failure to provide any evidence to address or resolve the point of diversion, dam location, and place of use issue remarks leaves the claims examination and resulting issue remarks as strong evidence of actual historical use.

## **Conclusions of law**

Based on information in the claim file and the Crosbys' failure to comply with orders issued by the Water Master, claim 43D 187860-00 should be amended as recommended by the point of diversion, dam location, and place of use issue remarks. The point of diversion, dam location, and place of use issue remarks are resolved.

### **Issues 3 and 4 – period of diversion; issue remark resolution**

Stock claim 43D 187860-00 appeared in the Preliminary Decree with the above referenced notice issue remark concerning period of diversion.

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 identified by the Preliminary Decree abstract is historically accurate. The notice issue remark concerning period of diversion served its purpose.

### **Recommendations**

Stock claim 43D 187860-00 should be amended as follows to accurately reflect historical use.

#### **POINT OF DIVERSION, DAM LOCATION, AND PLACE OF USE:**

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
NENWSE	NWNESE	19	9S	24E	CARBON

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.

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Anna M. Stradley  
Senior Water Master

#### **Service via USPS Mail**

Josephine M Crosby  
PO Box 112  
Cowley, WY 82420

Rodney W Crosby  
PO Box 36  
Cowley, WY 82420

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
CLARKS FORK YELLOWSTONE RIVER  
BASIN 43D**

**Water Right Number:** 43D 187860-00 STATEMENT OF CLAIM

**Version:** 4 -- POST DECREE

**Status:** ACTIVE

**Owners:** JOSEPHINE M CROSBY  
PO BOX 112  
COWLEY, WY 82420

RODNEY W CROSBY  
PO BOX 36  
COWLEY, WY 82420

**Priority Date:** JUNE 1, 1915

**Type of Historical Right:** USE

**Purpose (Use):** STOCK

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR. 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 HUNTERS 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		NENWSE	19	9S	24E	CARBON

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

**Diversion Means:** DAM

**Reservoir:** ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NENWSE	19	9S	24E	CARBON

**Diversion to Reservoir:** DIVERSION # 1

**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			NENWSE	19	9S	24E	CARBON