

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

CLAIMANTS: Ashton M. Walters; Andrew J. Logue; Daniel
L. Hallock; Ludon Deville; Richard Deville

CASE 43D-0629-R-2021
43D 4932-00

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

Domestic claim 43D 4932-00 appeared in the Preliminary Decree with an issue remark. Issue remarks may result from Department of Natural Resources and Conservation ("DNRC") claims examination. DNRC confirms the historical use of water right claims and identifies issues with claims. If DNRC cannot confirm some aspect of a claim, DNRC adds an issue remark to the claim.

The issue remark appearing on the claim states:

A SURFACE WATER NOTICE OF APPROPRIATION WAS SUBMITTED TO SUPPORT THIS CLAIM TO GROUNDWATER APPROPRIATED BETWEEN JANUARY 1, 1962 AND JULY 1, 1973.

No objections were filed to the claim. Montana law requires the Water Court to resolve issue remarks.

Issue

Is the issue remark concerning the form filed in support of statement of claim 43D 4932-00 resolved?

Finding of fact

The Preliminary Decree abstract for claim 43D 4932-00 identifies the historically accurate elements for the 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. 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. For groundwater appropriations between January 1, 1962 and July 1, 1973 a Notice of Appropriation and a Notice of Completion both had to be filed in order to have the priority date relate back to when the water was first diverted and used. If only a Notice of Completion was filed, the priority date is the date the Notice of Completion was filed. Section 89-2913(e), RCM (1965).

6. Where the information furnished on the two forms is substantially identical, allowing the printed designation and name of the form to control over the substance of the information provided is the unwarranted elevation of form over substance. *See In re the Charles M. Bair Family Trust*, 2008 MT 144, ¶ 43, 343 Mont. 138, 183 P.3d 61; *Yurczyk v. Yellowstone County*, 2004 MT 3, ¶ 22, 319 Mont. 169, 83 P.3d 266.

7. Judicial notice of facts may be taken from a source “whose accuracy cannot be reasonably questioned.” Rule 201, M.R.Ev.

8. Judicial notice is taken of the DNRC Water Rights Claim Examination Manual. Rule 202, M.R.Evid.

9. “The date of an appropriation appearing in a water right decree is material only in its relation to the question of priority.” *Vidal v. Kensler*, 100 Mont. 592, 541, 51 P.2d

235, 236 (1935).

Analysis

The May 2013 DNRC Water Right Claims Examination Manual, Ch. II defines developed spring as a “spring with some man-made development at or below the point of extrusion which brings additional flow to the surface which would not naturally be available for use and is classified as groundwater.” Domestic claim 43D 4932-00 identifies its source as a developed spring and is thereby classified as groundwater.

Pursuant to the 1961 Ground Water Code, for groundwater appropriations completed between January 1, 1962 and July 1, 1973, appropriators were required to file a Notice of Appropriation and a Notice of Completion of Groundwater Appropriation without Well (GW3) to preserve their priority date.

The development of the spring identified by claim 43D 4932-00 occurred after the effective date of the 1961 Ground Water Code. Neither a Notice of Appropriation nor a Notice of Completion of Groundwater Appropriation without Well (GW3) was filed with the statement of claim. Instead, a surface water Notice of Appropriation was filed with the statement of claim. Both forms, a Notice of Completion of Groundwater Appropriation without Well (GW3) and a surface water Notice of Appropriation were to be filed with the county clerk and recorder.

Not infrequently appropriators filed the incorrect forms for groundwater appropriations completed between January 1, 1962 and July 1, 1973.

The difference in the information required by the two forms is slight. Any person searching in county records for a recorded Notice of Completion of Groundwater Appropriation Without Well (GW3) would also find a recorded surface water Notice of Appropriation indexed under the same tract or owner. No other water user would have been deceived to their detriment because the wrong form was filed.

The only reasonable conclusion is that appropriators who filed an incorrect form intended to comply with the 1961 Ground Water Code. To decide otherwise would be to conclude that appropriators intentionally filed the wrong form with the knowledge they

would forfeit the right to use the groundwater they developed. The priority date of this claim should not depend upon the printed title of the form filed with the county clerk and recorder.

Based upon the requirements of the 1961 Ground Water Code and the officially recorded surface water Notice of Appropriation for claim 43D 4932-00, the historically accurate priority date for the claim would be the date the surface water Notice of Appropriation was filed with the county clerk and recorder, February 4, 1963. However, the priority date identified by the statement of claim and Preliminary Decree abstract is January 31, 1963, the date the claimants attested to the truthfulness of the information identified by the surface water Notice of Appropriation. This difference in priority date is irrelevant. Based upon the Preliminary Decree point of diversion index, claimants are the only appropriators claiming this developed spring, resulting in the relativity of the priority date staying the same whether the priority date is identified as January 31, 1963 or February 4, 1963.

Conclusions of law

The issue remark and the information resulting in the issue remark do not overcome the prima facie proof afforded statement of claim 43D 4932-00. The issue remark concerning the form filed in support of statement of claim 43D 4932-00 is resolved.

Recommendations

The elements of domestic claim 43D 4932-00 accurately reflect historical use. No changes to the elements of the claim should be made.

The issue remark should be removed from the claim abstract.

A Post Decree Abstract of Water Right Claim accompanies this report to confirm removal of the issue remark in the state's centralized water right record system.

Anna M. Stradley
Senior Water Master

Service via USPS Mail

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

Water Right Number: **43D 4932-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: LUDON DEVILLE
 PO BOX 250
 BEARCREEK, MT 59007

 RICHARD DEVILLE
 PO BOX 250
 BEARCREEK, MT 59007

 DANIEL L HALLOCK
 25 WASHOE SCHOOL RD
 BEARCREEK, MT 59007 9504

 ANDREW J LOGUE
 62 WASHOE CIR
 BEARCREEK, MT 59007 9503

 ASHTON M WALTERS
 62 WASHOE CIR
 BEARCREEK, MT 59007 9503

Priority Date: JANUARY 31, 1963

Type of Historical Right: FILED

Purpose (Use): DOMESTIC

Flow Rate: 35.00 GPM

Volume: 12.00 AC-FT

Households: 4

Maximum Acres: 4.00

Source Name: SPRING, UNNAMED TRIBUTARY OF BEAR CREEK

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		NWSENE	2	8S	20E	CARBON

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: PIPELINE

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	4.00		S2NW	1	8S	20E	CARBON

Total: 4.00