

Montana Water Court
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42KJ-6004-A-2022

November 16, 2022

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION - BASIN 42KJ
YELLOWSTONE RIVER DRAINAGE BETWEEN BIGHORN AND TONGUE RIVERS

CLAIMANTS: Davidson Cattle Company; State of Montana (Board
of Land Commissioners)

CASE 42KJ-6004-A-2022
42KJ 35067-00

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, conclusions 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 court held previous proceedings for claim 42KJ 35067-00, resulting in a stipulation that added Davidson Cattle Company as a co-owner to the claim and reservoir measurements to the reservoir record. Subsequently, Davidson Cattle Company filed a motion to amend the point of diversion and place of use for stock claim 42KJ 35067-00. Davidson Cattle Company provided notice of its proposed amendment to the previous objectors, the Crow Tribe and the United States of America (Bureau of Indian Affairs), and co-claimant the State of Montana (Board of Land Commissioners). The Crow Tribe and the United States of America (Bureau of Indian Affairs) did not object to the proposed amendment. The State of Montana (Board of Land Commissioners) did not respond. The court set a filing deadline for the State of Montana (Board of Land Commissioners) to indicate whether it agreed with the proposed amendment. The order included language that failure to file any comment by the deadline would be deemed the State of Montana (Board of Land Commissioners') agreement with the proposed amendment. The State of Montana (Board of Land Commissioners) did not respond by the filing deadline. Accordingly, co-claimant, the State of Montana (Board of Land Commissioners), agreed with the proposed amendment.

Issue

The point of diversion and place of use identified by the statement of claim and post decree abstract for claim 42KJ 35067-00 is the NENWNW of Section 36, Township 1 South, Range 38 East, Big Horn County. Davidson Cattle Company contends the historically accurate point of diversion and reservoir legal land description is the SESWSW of Section 25, Township 1 South, Range 38 East, Big Horn County, and the historically accurate place of use legal land description is the SESWSW of Section 25 and the NENWNW of Section 36, Township 1 South, Range 38 East, Big Horn County.

Should Davidson Cattle Company's motion to amend stock claim 42KJ 35067-00 be granted?

Findings of fact

1. Statement of claim 42KJ 35067-00 identified a point of diversion, reservoir, and place of use in the NENWNW of Section 36, Township 1 South, Range 38 East, Big Horn County.

2. A preponderance of evidence establishes the historically accurate point of diversion and reservoir legal land description for claim 42KJ 35067-00 is the SESWSW of Section 25, Township 1 South, Range 38 East, Big Horn County, and the historically accurate place of use legal land description should include the SESWSW of Section 25 and NENWNW of Section 36, Township 1 South, Range 38 East, Big Horn County.

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. The Montana Water Court has jurisdiction to review a motion to amend pursuant to Section 85-2-233(6), MCA.

4. If an element of a claim did not appear on the objection list for a basin, and a motion to amend that element is filed with the Court, notice by publication of the amendment is required if there is the possibility of adverse affect to other water users. Section 85-2-233(6), MCA.

5. Rule 15 M.R.Civ.P. restricts the scope of an amendment to the conduct,

transaction, or occurrence set forth in the original pleading - the “same set of operative facts as contained in the original pleading.” *Sooy v. Petrolane Steel Gas, Inc.*, 218 Mont. 418, 422-423, 708 P.2d 1014, 1017 (1985). The requested amendment “merely makes more specific that which has already been alleged.” *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15, 504 P.2d 277, 281 (1972).

6. The party seeking to amend a water right claim has the burden to show, by a preponderance of the evidence, that the claim elements they challenge do not accurately reflect the beneficial use of the water rights as they existed prior to July 1, 1973. *Nelson v. Brooks*, 2014 MT 120, ¶34, 375 Mont. 86, 329 P.3d 558; Rule 19, W.R.Adj.R.

Analysis

Davidson Cattle Company’s motion to amend claim 42KJ 35067-00 asserts the point of diversion and place of use identified by the statement of claim are not historically accurate. The historical accuracy of the amended point of diversion and place of use proposed by Davidson Cattle Company are supported by a 1958 topographic map attached to the August 4, 2004 United States of America (Bureau of Indian Affairs) objection to claim 42KJ 19859-00 (also mentioned in Davidson Cattle Company’s motion), and the 2011 aerial photo provided by Davidson Cattle Company with its proposed amendment.

The changes requested in the motion to amend arise out of the same conduct, transaction, or occurrence specified on the original statement of claim, and are based on the same operative facts specified in the statement of claim. The motion to amend and evidence in support of the motion to amend are sufficient to overcome the prima facie proof afforded statement of claim 42KJ 35067-00 and support the historical accuracy of the amended point of diversion, reservoir location (part of the point of diversion element), and place of use.

No intervening pre- or post-July 1, 1973 water users exist between the current and proposed legal land descriptions, and no increase in volume occurs through the addition of the place of use because the number of animal units historically served by the claim

remains the same. The amendments do not have the possibility to adversely affect other water users. No public notice of the amendments is required.

A copy of the 1958 topographic map and the 2011 aerial photo provided by Davidson Cattle Company are included with this report. The report, map, and aerial photo will be placed in the claim file for future reference.

Conclusion of law

Davidson Cattle Company's motion to amend stock claim 42KJ 35067-00 should be granted.

Recommendations

Claim 42KJ 35067-00 should be amended as follows to accurately reflect historical use.

POINT OF DIVERSION AND RESERVOIR LOCATION:

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
SESWSW	NENWNW	25 36	1S	38E	BIG HORN

PLACE OF USE:

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
	SESWSW	25	1S	38E	BIG HORN
	NENWNW	36	1S	38E	BIG HORN

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.

Anna M. Stradley
Senior Water Master

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POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, BETWEEN BIGHORN & TONGUE RIVERS
BASIN 42KJ

Water Right Number: 42KJ 35067-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: MONTANA STATE BOARD OF LAND COMMISSIONERS
TRUST LAND MANAGEMENT DIVISION
PO BOX 201601
HELENA, MT 59620 1601

***Owners:** DAVIDSON CATTLE CO
PO BOX 120
BIGHORN, MT 59010

Priority Date: APRIL 15, 1962

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: NO FLOW RATE HAS BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

Volume: THIS WATER 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: EAST FORK SARPY 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		SESWSW	25	1S	38E	BIG HORN

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>
	SESWSW	25	1S	38E	BIG HORN

Diversion to Reservoir: DIVERSION # 1

Dam Height: 12.33 FEET

Surface Area: 0.93 ACRES

Capacity: 3.95 ACRE-FEET

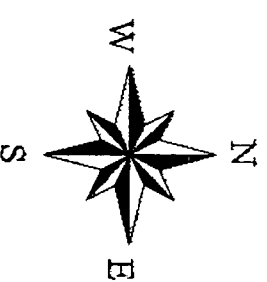
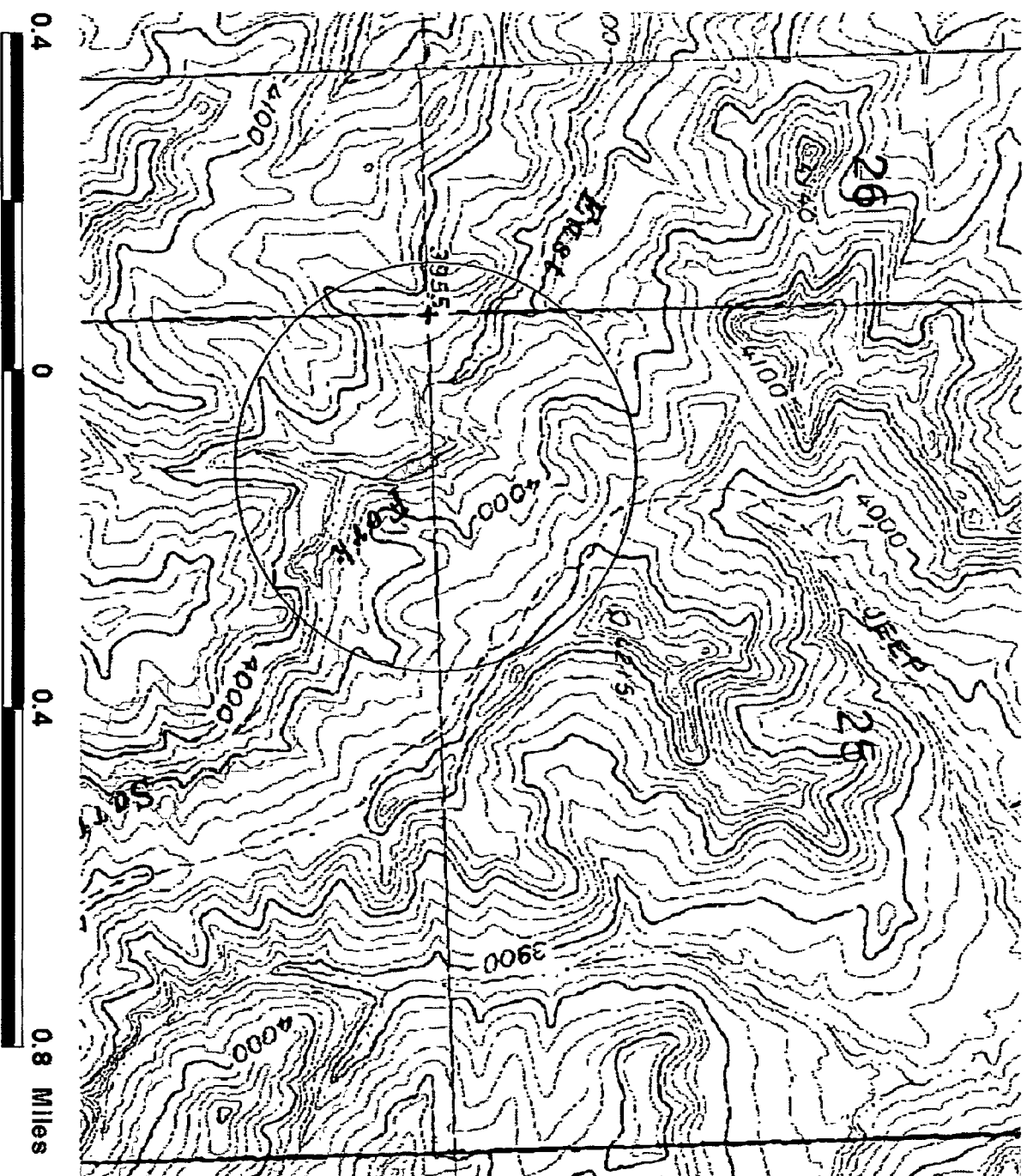
Period of Use: JANUARY 1 TO DECEMBER 31

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			NENWNW	36	1S	38E	BIG HORN
2			SESWSW	25	1S	38E	BIG HORN

42KJ-19859-00

Chalky Point Quad
1958 date





Place of use #1
NENWNW, Sec. 36, T1S, R38E

3

tabbies.