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FILED
10/13/2023
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Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
41K-0218-R-2023
White, Eugene
5.00

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
SUN RIVER BASIN (41K)

CLAIMANT: United States of America (USDA – Forest
Service)

CASE 41K-0218-R-2023

41K 56602-00
41K 56603-00
41K 56605-00
41K 56609-00
41K 56610-00

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

All water right claims that appeared in the Preliminary Decree for Sun River (Basin 41K) were subject to "issue remarks" resulting from pre-decree examination by the DNRC, objections, and counterobjections. The above-captioned claims received an issue remark during the DNRC's review of the claims.

FINDINGS OF FACT

1. Claim 41K 56605-00 received the following substantive issue remark:

AN AMENDMENT WAS SUBMITTED ON 08/12/2020 REQUESTING TO AMEND THE PURPOSE AND FLOW RATE. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

Each of the remaining claims received the following substantive issue remark:

AN AMENDMENT WAS SUBMITTED ON 08/12/2020 REQUESTING TO AMEND THE FLOW RATE. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

2. Claims 41K 56602-00, 41K 56603-00, 41K 56605-00, 41K 56609-00, and 41K 56610-00 were consolidated into Case 41K-0218-R-2023 and an Order Setting Filing Deadline was issued by the Water Court requesting any additional information needed to resolve the issue remarks.

3. On April 26, 2023, Claimant United States Department of Agriculture, Forest service (“Forest Service”) filed a *Response* which reiterated that the previously filed amendment resolved the issue remark and brought the claims into historical conformity. The *Response* states that corrections to the flow rates are necessary to correct a decimal error in the original filings. The *Response* included attachments of the amendments requesting the following modifications to the claims:

41K 56602-00, 41K 56603-00, 41K 56609-00, and 41K 56610-00

8. Flow Rate Claimed: 5.0

- ☐ cubic feet per second
☒ gallons per minute
☐ miner's inches

4. The Forest Service’s *Response* filed on April 26, 2023, also stated that modification to the flow rate of claim 41K 56605-00 was necessary to correct a decimal error in the original filing and requested the inclusion of a remark noting that the purpose was for a resort. Included in the *Response* was an attachment of the *Motion to Amend*

filed on August 12, 2020, which requested the following amendments to claim 41K 56605-00:

1. **Purpose (use):** Add Purpose Remark: Resort
a. If irrigation, method of irrigation use ☐ Sprinkler ☐ Flood ☐ Water spreading
8. **Flow Rate Claimed:** 10.0 ☐ cubic feet per second
☒ gallons per minute
☐ miner's inches

5. On June 26, 2023, the Court issued another Order Setting Filing Deadline requesting clarification and a proposed abstract from the Forest Service as to which remark it proposed to add to claim 41K 56605-00.

6. On August 8, 2023, the Forest Service filed a second *Response*. In its second *Response*, the Forest Service states, “upon further review, the Forest Service no longer believes that a remark is necessary, and that the current purpose is sufficiently clear. Implementation of the Forest Service’s amendment as to the flow rate would resolve the issue remark.”

PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.
2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.
3. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.
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. The proposed modifications contained in the Forest Service’s *Response* and previously filed *Motion to Amend* resolve the issue remarks appearing on the claims. Based on the information contained in the Forest Service’s first *Response*, along with the

information contained in the attached *Motions to Amend*, the flow rate for claims 41K 56602-00, 41K 56603-00, 41K 56609-00, and 41K 56610-00 should be modified as described in Finding of Fact No. 2. Additionally, the flow rate for claim 41K 56605-00 should be modified as described in Finding of Fact No. 3. The modifications resolve the issue remarks, and the issue remarks should be removed from the claims.

2. The requested amendments do not have the reasonable potential to adversely affect other water rights as they are corrections to the abstracts which do not make any change to the actual historical use of the claimed rights on the ground. Notice by publication of these amendments is not required.

RECOMMENDATIONS

The flow rate of claims 41K 56602-00, 41K 56603-00, 41K 56609-00, and 41K 56610-00 should be modified to 5.00 gpm, the flow rate of claim 41K 56605-00 should be modified to 10.00 gpm, and the issue remarks be removed from the claims.

Post decree abstracts of the water right claims reflecting the recommended changes are attached to this Report.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service Via Electronic Mail:

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\\JUDHLNSRV-DATA\Share\JUDGALH2OSRV (Datavol)\Share\WC-BASIN FOLDERS\41K PD\41K Cases\218\41K-0218-R-2023 MR (multiple claims, response filed make changes per VMA, second response not need for info remark) 9-25-23 jbc.docx