

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
KOOTENAI RIVER BASIN (76D)
PRELIMINARY DECREE

* * * * *

CLAIMANT: Charles J. Greene

CASE 76D-0213-R-2022

76D 47437-00

OBJECTOR: United States of America (USDA Forest Service)

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 United States of America (USDA Forest Service) (“USDA Forest Service”) filed an objection to the point of diversion for irrigation claim 76D 47437-00. The claim also received issue remarks.

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.

RESERVOIR RECORD WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 24 TIMES THE CAPACITY OF THE RESERVOIR.

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 objections and issue remarks.

The Water Master held a status conference to discuss the objection to and issue remarks appearing on the claim. Claimant, Charles J. Greene, failed to appear. The USDA Forest Service requested time to file a suggested resolution of its objection and evidence in support.

On March 15, 2023, the USDA Forest Service filed its proposed resolution of objection and evidence in support of its proposed resolution of objection. Pursuant to Rule 22, W.R.Adj.R., the court set a deadline for claimant to Show Cause why the claim should not be amended as proposed by the USDA Forest Service. Mr. Greene did not respond by the deadline. The resolution of objection filed by the USDA Forest Service did not resolve all issue remarks on the claim. Therefore, the court ordered claimant to resolve the issue remarks on the claim. Claimant failed to complete the issue remark

process. Pursuant to § 85-2-248(9)(a),(b), MCA, the court set a second show cause filing deadline for claimant. Mr. Greene failed to respond.

Issues

1. Is the objection to irrigation claim 76D 47437-00 resolved?
2. Are the issue remarks appearing on irrigation claim 76D 47437-00 resolved?

Findings of fact

Prima facie statement of claim 76D 47437-00 and its attachments establish:

1. One of the four historically accurate points of diversion is the NENWNE of Section 14, Township 31 North, Range 29 West, Lincoln County.
2. The means of diversion for 3 points of diversion is pipeline. The means of diversion for the point of diversion in the NENWNE of Section 14, Township 31 North, Range 29 West, Lincoln County should remain headgate.
3. The claim is a direct flow claim. The reservoir record should be removed from the claim, the volume should be removed from the claim and a standard information remark should be added stating the volume of the claim shall not exceed that put to historical beneficial use, and a quantified flow rate of 22.44 GPM should be added to the claim.
4. A clerical error exists for the period of diversion identified by the point of diversion located in the NESWNE, of Section 14, Township 31 North, Range 29 West, Lincoln County. The period of diversion should match the period of use, February 1 to August 31.

Principles of law

1. A properly filed Statement of Claim for Existing Water Right or an amended 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. 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. When a claimant fails to comply with an Order issued by the Water Court, including an order issued by a Water Master appointed by the Court, the Court upon its own initiative or upon motion, can among other actions: 1) modify the elements of the claim to conform with the information in the claim file, information obtained by the Court, or information included in an objection, or 2) terminate the claim. Rule 22, W.R.Adj.R.; Section 85-2-248(9)(a),(b), 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. A clerical mistake or mistake arising from omission or oversight may be corrected by the court at any time. Rule 60(a), M.R.Civ.P.

Analysis

Objection and issue remark resolution

The USDA Forest Service explained that the point of diversion located in the NWNWNE of Section 14, Township 31 North, Range 29 West, Lincoln County is on federal land and should instead be located on land owned by the claimant and identified

by *prima facie* statement of claim 76D 47437-00, the NENWNE of Section 14, Township 31 North, Range 29 West, Lincoln County. *See* the map attached to statement of claim 76D 47437-00.

DNRC reviewed the claim file. The DNRC Memorandum stated that claim 76D 47437-00 is a direct flow claim diverted by pipeline and ditch from four developed springs. DNRC recommended modification of the means of diversion to pipeline based upon the filed notice of appropriation included with the statement of claim, removal of the reservoir record, a volume reduction to the guideline for flood irrigation in climatic area 3, and correction of a clerical error in the period of diversion identified by one of the four points of diversion. This Master agreed with all recommendations provided by the DNRC except for the lack of a quantified flow rate and the identification of a quantified volume because the DNRC stated the claim was a direct flow claim (no storage involved), and the proposed modified means of diversion for the point of diversion located in the NENWNE of Section 14, Township 31 North, Range 29 West, Lincoln County because the USDA Forest Service proposed that the means of diversion for the point of diversion remain headgate.

Mr. Greene's failure to provide any evidence to address or resolve the objection and issue remarks left the USDA Forest Service's review, the DNRC's review, and the Master's review of the claim file as strong evidence of actual historical use.

The USDA Forest Service Response to Court Order may be viewed on the court's case management system, FullCourt Enterprise, at document sequence 4.00. The DNRC's Memorandum and attachments may be viewed on the court's case management system, FullCourt Enterprise, at document sequence 7.00.

Conclusions of law

Based upon the USDA Forest Service's review of the claim file and proposed amendment, DNRC's review of the claim file and recommendations, information before the court in the claim file, and Mr. Greene's repeated failure to comply with orders issued by the Water Master, the USDA Forest Service's requested sanction appears just and the

claim should be amended as requested by the USDA Forest Service, the claim should be amended as recommended by the DNRC, and the claim should be amended as suggested by the court. The USDA Forest Service objection is resolved, and the issue remarks are resolved.

Recommendations

Irrigation claim 76D 47437-00 should be amended as follows to accurately reflect historical use.

FLOW RATE: **22.44 GPM¹**

~~A SPECIFIC FLOW RATE HAS NOT BEEN DETERMINED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.~~

VOLUME: **60.00 AF**

THE TOTAL VOLUME OF THIS RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE².

POINT OF DIVERSION AND MEANS OF DIVERSION:

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
NESENE	14	31N	29W	LINCOLN	

Period of Diversion: ~~JANUARY 1 TO DECEMBER 31~~ **FEBRUARY 1 TO AUGUST 31**
Diversion Means: ~~HEADGATE~~ **PIPELINE**

SENWNE	14	31N	29W	LINCOLN
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Period of Diversion: **FEBRUARY 1 TO AUGUST 31**
Diversion Means: ~~HEADGATE~~ **PIPELINE**

SENWNE	14	31N	29W	LINCOLN
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Period of Diversion: **FEBRUARY 1 TO AUGUST 31**
Diversion Means: ~~HEADGATE~~ **PIPELINE**

NENWNE	NWNWNE	14	31N	29W	LINCOLN
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Period of Diversion: **FEBRUARY 1 TO AUGUST 31**
Diversion Means: ~~HEADGATE~~

Reservoir: ~~ONSTREAM~~

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
NESENE		14	31N	29W	LINCOLN

Diversion to Reservoir: ~~Diversion #1~~

Dam Height: ~~5.00 FEET~~

Depth: ~~3.00 FEET~~

¹ Based upon the filed notice of appropriation in the claim file.

² Based upon the claim being a direct flow irrigation claim.

Surface Area: 0.50 ACRES
Capacity: 1.00 AF

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.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail

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Service via Electronic Mail

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POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D

Water Right Number: **76D 47437-00 STATEMENT OF CLAIM**

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:
CHARLES J GREENE
PO BOX 1078
LIBBY, MT 59923 1078

Priority Date: JULY 1, 1913

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 22.44 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: 15.00

Source Name: SPRING, UNNAMED TRIBUTARY OF LAKE KOOCANUSA

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1		NESE	14	31N	29W	LINCOLN
Period of Diversion:	FEBRUARY 1 TO AUGUST 31					
Diversion Means:	PIPELINE					
2		SENW	14	31N	29W	LINCOLN
Period of Diversion:	FEBRUARY 1 TO AUGUST 31					
Diversion Means:	PIPELINE					
3		SENW	14	31N	29W	LINCOLN
Period of Diversion:	FEBRUARY 1 TO AUGUST 31					
Diversion Means:	PIPELINE					
4		NENW	14	31N	29W	LINCOLN
Period of Diversion:	FEBRUARY 1 TO AUGUST 31					
Diversion Means:	HEADGATE					

Period of Use: FEBRUARY 1 TO AUGUST 31

Place of Use:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	9.00		W2E2NE	14	31N	29W	LINCOLN
2	2.00		SENW	14	31N	29W	LINCOLN

3 4.00
Total: 15.00

NENWNE 14 31N 29W LINCOLN