

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: HILT Venture Cap Inc.

OBJECTOR: United States of America (USDA Forest Service)

CASE 76D-0214-R-2022
76D 45133-00

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 United States of America (USDA Forest Service) (“Forest Service”) filed an objection to all elements of fish and wildlife claim 76D 45133-00.

Fish and wildlife claim 76D 45133-00 appeared in the Preliminary Decree with the following 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.

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE HEADGATE CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

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.

On August 16, 2023, HILT Venture Cap Inc. and the Forest Service filed a Stipulation to Resolve Objections.

Issues

1. Should the court accept the stipulated terms?
2. Are the issue remarks resolved?

Findings of fact

1. A preponderance of evidence establishes that the historically accurate point of diversion and reservoir location for fish and wildlife claim 76D 45133-00 is the NWSE of Section 6, Township 32 North, Range 33 West, Lincoln County.

2. The Preliminary Decree abstract for fish and wildlife claim 76D 45133-00 identifies the historically accurate period of diversion, year-round.

3. The following information remark should appear for flow rate, “The flow rate

is limited to what is reasonably necessary to maintain the level of Skinner Lake consistent with historical use.”

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. Settlement, including the documents filed by a claimant where the claimant is the only party, is subject to review and approval by the Water Court. Rule 17(a), W.R.Adj.R.

4. If the settlement agreement expands or enlarges an element of a claim, evidence meeting the burden of proof must be provided. If the evidence does not meet the burden of proof, the element shall not be expanded or enlarged. Rule 17(b), W.R.Adj.R.

5. Water rights not susceptible to measurement by flow rate should identify a quantified volume. Section 85-2-234(6)(b)(ii), MCA.

6. 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.

7. 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.

8. The Water Court may add clear and unambiguous information remarks to a claim abstract that describe historical use and reduce the possibility of future conflict. *See Clark Fork Coalition v. Hirsch*, 2014 Mont. Water LEXIS 15 at **10-14 (Oct. 29, 2014).

Analysis

Issue 1 - stipulated terms

Fish and wildlife claim 76D 45133-00 includes information remarks stating, “Section 6 T32N R33W is Protraction Block: PB39.” and “The use of this water appears to be largely nonconsumptive.” The Stipulation explains:

- this area is an unsurveyed area,
- the point of diversion, a headgate on the North Fork of O’Brien Creek, is located on National Forest System land, and
- the reservoir, also known as Skinner Lake, is an offstream reservoir.

The parties’ stipulated flow rate information remark is supported by the claim file. The claim appears to be a hybrid, identifying a means of diversion from a source, but also identifying the storage location as a natural lake with no man-made structure resulting in the stored water. *See* claim file Reservoir Questionnaire received by DNRC on Feb. 17, 1983. Pursuant to Water Right Claim Examination Rules the offstream point of diversion and means of diversion indicates a quantified flow rate should be identified, but the place of storage, a natural lake indicates a quantified flow rate should not be identified. Given this specific scenario, the stipulated flow rate information remark in conjunction with the quantified volume and already present nonconsumptive information remark below volume provides a meaningful way to quantify the claim.

The parties’ stipulated less specific legal land description for the point of diversion and lake location is supported by the stipulation’s explanation of the system and the claim file. The hand drawn map attached to the statement of claim matches the more detailed computer-generated map attached to the stipulation. *See* Ex. 2, Aug. 16, 2023

Stipulation.

The Stipulation and its exhibits may be viewed on the court's case management system, FullCourt Enterprise, at document sequence 11.00.

Conclusions of law

The stipulated information remark concerning flow rate describes historical use, reduces the possibility of future conflict, and in conjunction with the quantified volume and nonconsumptive use information remark below volume, provides the statutorily required quantification of the water right claim. The flow rate information remark should be added to the claim abstract.

The parties provided a preponderance of evidence supporting the less specific point of diversion and place of storage legal land description thereby overcoming the prima facie statement of claim. The parties' evidence confirmed the map attached to the statement of claim and justified the modifications to the claim.

The Stipulation should be accepted by the court thereby resolving the Forest Service objection.

Issue 2 – issue remark resolution

The stipulation provided an explanation concerning the location of the headgate on the North Fork of O'Brien Creek.

Although the Forest Service objected to all elements of the claim, the stipulated terms resolved its objection. The stipulated terms make no mention of the period of diversion identified by the Preliminary Decree abstract, thereby confirming the historical accuracy of the period of diversion.

Conclusions of law

The parties' stipulation resolved the point of diversion issue remark appearing on the Preliminary Decree abstract.

The period of diversion issue remark served its notice purpose.

Recommendations

Fish and wildlife claim 76D 45133-00-00 should be modified as follows to accurately reflect historical use.

FLOW RATE:

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

THE FLOW RATE IS LIMITED TO WHAT IS REASONABLY NECESSARY TO MAINTAIN THE LEVEL OF SKINNER LAKE CONSISTENT WITH HISTORICAL USE.

POINT OF DIVERSION:

| | | | | | |
|-----------------|----------------|------------|------------|------------|---------------|
| <u>GOVT LOT</u> | <u>QTR SEC</u> | <u>SEC</u> | <u>TWP</u> | <u>RGE</u> | <u>COUNTY</u> |
| NWSE | NWSESE | 6 | 32N | 33W | LINCOLN |

Reservoir: ~~ONSTREAM~~ **OFFSTREAM** **Reservoir Name: SKINNER LAKE**

| | | | | | |
|-----------------|----------------|------------|------------|------------|---------------|
| <u>GOVT LOT</u> | <u>QTR SEC</u> | <u>SEC</u> | <u>TWP</u> | <u>RGE</u> | <u>COUNTY</u> |
| NWSE | NWSESE | 6 | 32N | 33W | LINCOLN |

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.

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

Water Right Number: 76D 45133-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: HILT VENTURE CAP INC
3812 124TH AVE CT E
EDGEWOOD, WA 98372

Priority Date: MAY 14, 1922

Type of Historical Right: FILED

Purpose (use): FISH AND WILDLIFE

Flow Rate:

THE FLOW RATE IS LIMITED TO WHAT IS REASONABLY NECESSARY TO MAINTAIN THE LEVEL OF SKINNER LAKE CONSISTENT WITH HISTORICAL USE.

Volume: 562.00 AC-FT

THE USE OF THIS WATER APPEARS TO BE LARGELY NONCONSUMPTIVE.

Source Name: OBRIEN CREEK, NORTH FORK

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 | | NWSE | 6 | 32N | 33W | LINCOLN |

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

Reservoir: OFFSTREAM **Reservoir Name:** SKINNER LAKE

| <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------------|----------------|------------|------------|------------|---------------|
| | NWSE | 6 | 32N | 33W | LINCOLN |

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 | | | NENW | 6 | 32N | 33W | LINCOLN |
| 2 | | | SENE | 6 | 32N | 33W | LINCOLN |
| 3 | | | NESW | 6 | 32N | 33W | LINCOLN |

Remarks:

SECTION 6 T32N R33W IS PROTRACTION BLOCK: PB39.