

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: Robert F. Dunlap, Jr. Revocable Trust

CASE 76D-0511-R-2023
76D 140152-00

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 above captioned irrigation claim appeared in the Preliminary Decree with the following issue remark:

THE CLAIMED FLOW RATE MAY BE QUESTIONABLE. DOCUMENTATION SUBMITTED WITH THIS CLAIM INDICATES A FLOW RATE OF 3.00 CFS.

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 issue remarks. An order set a filing deadline for claimant to file its agreement with a flow rate of 3.00 CFS or evidence establishing the type of historical right and priority date for the 0.34 CFS not identified by the filed notice of appropriation. The court order informed claimant that its lack of reply would be deemed their agreement to the suggested resolution of the issue remark. The court order also included the following language: "Failure to comply with this order may result in modification of your water right." Claimant, the Robert F. Dunlap, Jr. Revocable Trust, failed to participate in the issue remark resolution process.

Issues

What flow rate should irrigation claim 76D 140152-00 identify and is the flow rate issue remark resolved?

Finding of fact

The flow rate for irrigation claim 76D 140152-00 should be 3.00 CFS.

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. 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. 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. 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. If a claimant fails to comply with an Order issued by the Court in its review of issue remarks, the Court may amend the claim to

conform with information found in the claim file and information before the Court.
Section 85-2-248(9)(a),(b), MCA.

Analysis

Issues – flow rate and issue remark resolution

The claim's historical basis is a filed right (a filed notice of appropriation). The claimed flow rate exceeds the amount identified by the filed notice of appropriation, resulting in the placement of the overfiled notice of appropriation issue remark on claim 76D 140152-00. Based upon the filed notice of appropriation, the flow rate should be 3.00 CFS.

Based upon the foregoing and pursuant to § 85-2-248(3), MCA, claimant was ordered to file a statement with the court agreeing with the suggested 3.00 CFS flow rate or to file evidence establishing the type of historical right and priority date for the 0.34 CFS in excess of the amount identified by the filed notice of appropriation. Claimant failed to file a statement or evidence by the deadline.

Claimant's failure to provide any evidence to address or resolve the flow rate issue remark leaves the suggested 3.00 CFS flow rate as evidence of actual historical use.

Conclusions of law

Based on information in the claim file and before the court, and the Robert F. Dunlap, Jr. Revocable Trust's failure to comply with an order issued by the court, irrigation claim 76D 140152-00 should be amended as recommended by the order setting filing deadline. The flow rate issue remark is resolved.

Recommendations

Irrigation claim 76D 140152-00 should be amended as follows to accurately

reflect historical use.

FLOW RATE: ~~3.34 CFS~~ **3.00 CFS**

The flow rate issue remark appearing on the claim should be removed.

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

Robert F Dunlap Jr Revocable Trust
% Robert F Dunlap Jr & James M Neill Trustees
PO Box 3415
Fort Worth TX 76113-3415

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

Water Right Number: 76D 140152-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: DUNLAP, ROBERT F JR REVOCABLE TRUST
% ROBERT F DUNLAP JR & JAMES M NEILL TTEE
PO BOX 3415
FORT WORTH, TX 76113 3415

Priority Date: SEPTEMBER 15, 1904

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER

Flow Rate: 3.00 CFS

Volume: 360.00 AC-FT

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 132.00

Source Name: BRIMSTONE 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		SWSENE	1	34N	26W	LINCOLN

Period of Diversion: MARCH 15 TO SEPTEMBER 30

Diversion Means: PUMP

2		NESESE	1	34N	26W	LINCOLN
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Period of Diversion: MARCH 15 TO SEPTEMBER 30

Diversion Means: PUMP

Period of Use: MARCH 15 TO SEPTEMBER 30

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	50.00		E2SE	1	34N	26W	LINCOLN
2	62.00		E2NE	1	34N	26W	LINCOLN
3	20.00		S2SESE	36	35N	26W	LINCOLN

Total: 132.00

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

140151-00

140152-00