

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

CLAIMANTS: Brewer Family Trust; Vredenburg Family LP;
Rebecca A. Vredenburg Family Trust; Xyane
W. Vredenburg; Mariah Vredenburg; Raini
Hale; Tyler Hale; Gabe Marsh

CASE 76D-0595-R-2024
76D 140691-00

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 stock claim appeared in the Preliminary Decree with the following issue remarks:

THE FLOW RATE IS MISSING.

POINT OF DIVERSION AND MEANS OF DIVERSION WERE 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.

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. There was enough information before the court to resolve the issue remark concerning DNRC's modification of the point of diversion and means of diversion. The issue remark concerning flow rate was not resolved through the objection process and while there appeared to be enough information in the claim file and before the court to resolve the issue remark, pursuant to § 85-2-248(11), MCA the court may not resolve an issue remark modifying an element without agreement from the claimants. An order set a filing deadline for claimants to file their agreement with a flow rate of 5.00 CFS or evidence supporting the historical flow rate. Claimants failed to participate in the issue remark resolution process. The court order informed claimants that their 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."

Issues

1. What flow rate should stock claim 76D 140691-00 identify?
2. Are the issue remarks appearing on stock claim 76D 140691-00 resolved?

Finding of fact

The historical flow rate for stock claim 76D 140691-00 is 5.00 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 1 and 2 – flow rate and issue remark resolution

Based upon a review of the record before the court, stock claim 76D 140691-00 is one of four claims in a multiple use relationship. Multiple uses of a water right occur when one water right is used for more than one purpose. Each of the claims - stock claim (76D 140690-00), stock claim (76D 140691-00), domestic claim (76D 140694-00), and fish and wildlife claim (76D 140699-00) - identify the same Charles Therriault filed notice of appropriation for 200.00 miner's inches (5.00 CFS) of Therriault Creek as their historical basis. Each of the claims appeared with a multiple use information remark. The purpose of the multiple use information remark is to identify the claims in the multiple use relationship and to limit the claims to the total amount of water historically appropriated – here a total of 5.00 CFS.

During claims examination, DNRC treated the flow rate for each claim in this multiple use relationship in a different manner. DNRC modified the claimed flow rates for stock claim 76D 140690-00 and domestic claim 76D 140694-00, zeroed out the flow rate for stock claim 76D 140691-00 (the claim in these case proceedings), and did not modify the flow rate identified by fish and wildlife statement of claim 76D 140699-00.

Pursuant to contemporary DNRC claim examination guidelines¹, stock claim 76D 140691-00 includes offstream reservoirs and identifies “pipeline” as the means of

¹ See Rule 24(b), Water Right Claim Examination Rules.

diversion for two points of diversion. Accordingly, claim 76D 140691-00 should identify a quantified flow rate. The 5.00 CFS flow rate identified by stock statement of claim 76D 140691-00 and supported by the Charles Therriault filed notice of appropriation for Therriault Creek is entitled to prima facie proof. Based upon this information and pursuant to § 85-2-248(3), MCA, claimants were ordered to file a statement with the court agreeing with the suggested 5.00 CFS flow rate or to file evidence establishing the historical flow rate. Claimants failed to file a statement or evidence by the deadline. Claimants' failure to provide any evidence to address or resolve the flow rate issue remark leaves the prima facie flow rate of 5.00 CFS as strong evidence of actual historical use.

An additional issue remark on claim 76D 140691-00 noted point of diversion and means of diversion were modified by DNRC during claims examination. The issue remark instructed claimants and other water users that if no objections were filed to the elements identified by the issue remark, the elements would remain as they appear on the Preliminary Decree abstract. No one objected to the elements of claim 76D 140691-00.

Conclusions of law

Based on information in the claim file and before the court, and the claimants' failure to comply with an order issued by the Water Master, stock claim 76D 140691-00 should be amended as recommended by the order setting filing deadline. The flow rate issue remark is resolved.

The Preliminary Decree abstract for stock claim 76D 140691-00 identifies the historically accurate point of diversion and means of diversion. The issue remark concerning these elements served its notice purpose.

Recommendations

Based upon the foregoing, stock claim 76D 140691-00 should be amended as follows to accurately reflect historical use.

FLOW RATE:

BLANK

5.00 CFS

The issue remarks 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

Brewer Family Trust
PO Box 1584
Eureka, MT 59917-1584

Vredenburg Family LP
PO Box 990
Eureka, MT 59917-0990

Rebecca A. Vredenburg Family Trust
PO Box 1321
Eureka, MT 59917-1321

Service via USPS Mail

Xyane W. Vredenburg
PO Box 244
Eureka, MT 59917

Mariah Vredenburg
Gabe Marsh
PO Box 2117
Eureka, MT 59917
~~13495 NW Killin Rd~~
~~Banks, OR 97106-8897~~
(Returned Mail Received 3/13/2024)

Raini Hale
Tyler Hale
7343 SE Lois St
Hillsboro, OR 97123-6038

Service List Updated 4/25/2024

\\JUDHLNSRV-DATA\Share\JUDGALH2OSRV (Datavol)\Share\WC-BASIN FOLDERS\76D PD\76D Cases\76D-0595-R-2024\MR--76D-595R sjs.docx

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

Water Right Number: 76D 140691-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:

RAINI HALE
7343 SE LOIS ST
HILLSBORO, OR 97123-6038

TYLER HALE
7343 SE LOIS ST
HILLSBORO, OR 97123-6038

GABE MARSH
13495 NW KILLIN RD
BANKS, OR 97106-8897

MARIAH VREDENBURG
13495 NW KILLIN RD
BANKS, OR 97106-8897

XYANE W VREDENBURG
PO BOX 244
EUREKA, MT 59917

BREWER FAMILY TRUST
PO BOX 1584
EUREKA, MT 59917-1584

VREDENBURG FAMILY LP
PO BOX 990
EUREKA, MT 59917-0990

VREDENBURG, REBECCA A FAMILY TRUST
PO BOX 1321
EUREKA, MT 59917-1321

Priority Date: JUNE 10, 1893

Type of Historical Right: FILED

Purpose (Use): STOCK

Flow Rate: 5.00 CFS

Volume: THIS 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: THERRIAULT 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		SE	34	36N	26W	LINCOLN
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
2		NWNE	3	35N	26W	LINCOLN
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
3		NW	3	35N	26W	LINCOLN
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
4		NWSESE	34	36N	26W	LINCOLN
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	PIPELINE					
5		NENESE	34	36N	26W	LINCOLN
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	PIPELINE					
Reservoir:	OFFSTREAM					

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SWSESE	34	36N	26W	LINCOLN

Diversion to Reservoir: DIVERSION # 1

Reservoir: OFFSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SESESW	34	36N	26W	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			SE	34	36N	26W	LINCOLN
2			NWNE	3	35N	26W	LINCOLN
3			NW	3	35N	26W	LINCOLN
4			SWSESE	34	36N	26W	LINCOLN
5			SESESW	34	36N	26W	LINCOLN

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

140690-00 140691-00 140694-00 140699-00