

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MADISON RIVER BASIN (41F)
PRELIMINARY DECREE

CLAIMANTS: Marnie Smith, Kirk Smith

OBJECTOR: United States of America (Bureau of Land
Management)

CASE 41F-0058-R-2024
41F 132641-00

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 (Bureau of Land Management) (“BLM”) filed an objection to the point of diversion and place of use identified by stock claim 41F 132641-00.

Claim 41F 132641-00 appeared in the Preliminary Decree with notice issue remarks concerning a late objection, source, point of diversion and means of diversion. 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. Issue remarks may also provide notice to water users concerning a claim.

Montana law requires the Water Court to resolve objections and issue remarks. On January 17, 2025, the parties filed a Stipulation to Resolve Objection.

Issues

1. Should the court accept the stipulated terms?
2. Are the issue remarks on claim 41F 132641-00 resolved?

Findings of Fact

1. The historical point of diversion and place of use identified by claim 41F 132641-00 does not include federal land managed by the BLM in the E2 of Section 8, and the S2NW and SWNE of Section 9, all in Township 7 South, Range 2 West. The point of diversion and place of use legal land descriptions should exclude these legal land descriptions.

2. Due to the stipulated refined point of diversion and place of use, the Unnamed Tributary of Moran Creek is no longer a source.

3. The Preliminary Decree abstract for claim 41F 132641-00 identifies the historically accurate means of diversion.

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. The Water Court may accept a settlement agreement that reduces or limits an element of a claim and need not determine whether the burden of proof is met unless there is an unresolved issue remark on the claim. Rule 17(c), W.R.Adj.R.

5. 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.

6. 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.

7. A timely filed objection may be amended. Notice by publication of an amendment is required if there is the possibility of adverse affect to other water users. Section 85-2-233(6), MCA.

8. Rule 15, M.R.Civ.P., restricts the scope of an amendment to the conduct, transaction, or occurrence set forth in the original pleading - the “same set of operative

facts as contained in the original pleading.” *Sooy v. Petrolane Steel Gas, Inc.*, 218 Mont. 418, 422-423, 708 P.2d 1014, 1017 (1985). The requested amendment “merely makes more specific that which has already been alleged.” *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15, 504 P.2d 277, 281 (1972).

9. The party seeking to amend a water right claim has the burden to show, by a preponderance of the evidence, that the claim elements they challenge do not accurately reflect the beneficial use of the water rights as they existed prior to July 1, 1973. *Nelson v. Brooks*, 2014 MT 120, ¶34, 375 Mont. 86, 329 P.3d 558; Rule 19, W.R.Adj.R.

Analysis

Issue 1 – acceptance of stipulated terms

The parties stipulated to the removal of land owned by BLM from the point of diversion and the place of use, and the removal of a source name for stock claim 41F 132641-00.

Source name did not appear on the Basin 41F Preliminary Decree objection list. Therefore, other water users failed to receive notice that the element may be modified. Accordingly, the parties’ stipulated proposed modification to the source identified by claim 41F 132641-00 is deemed a motion to amend the objection filed by the BLM. The removal of the source is a reduction. No possibility of adverse effect to other water users exists. Additional notice of the amended objection is not required

Conclusions of law

The evidence entered into the record is a reduction within the parameters of statement of claim 41F 132641-00, justifies the modifications to the claim, and resolves the BLM’s objection to the claim. The stipulated terms should be accepted by the court.

Issue 2 – issue remark resolution claim 41F 132641-00

Claim 41F 132641-00 appeared in the Preliminary Decree with two issue remarks. The first issue remark states:

SOURCE NAME, 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.

Water users were given the opportunity to review the claim and file an objection. Claim 41F 132641-00 received an objection to its point of diversion, and the parties' stipulation resulted in an amendment of the objection to include source. Where BLM objected to the elements identified by the notice issue remarks, those objections are resolved by these proceedings.

The second issue remark states:

A LATE OBJECTION HAS BEEN FILED TO THE PLACE OF USE AND POINT OF DIVERSION OF THIS WATER RIGHT CLAIM. IT WILL BE RESOLVED DURING THE ADJUDICATION OF OBJECTIONS TO THE PRELIMINARY DECREE.

The court provided notice to the late objector of these case proceedings. The notice to the late objector stated that the failure to appear would lead to the conclusion that the late objector did not wish to participate in the case proceedings and the other parties in the case would be provided the opportunity to assume the late objection. The late objector did not appear. The other parties in this case were provided the opportunity to assume the late objection. No party wished to assume the late objection.

Conclusion of law

The referenced issue remarks served their notice purpose.

Recommendations

Stock claim 41F 132641-00 should be modified as follows to accurately reflect historical use.

SOURCE: MORAN CREEK
~~UNNAMED TRIBUTARY OF MORAN CREEK~~

POINT OF DIVERSION AND PLACE OF USE:

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
	E2	8	7S	2W	MADISON
SENE	S2N2	9	7S	2W	MADISON
	N2	10	7S	2W	MADISON

The notice issue remarks should be removed from the claim abstract.

A Post Decree Abstract of Water Right Claim accompanies this report to confirm

the recommendations have been implemented in the state's centralized water right record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MADISON RIVER
BASIN 41F**

Water Right Number: 41F 132641-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: KIRK SMITH
288 AXOLOTL LAKES RD
ENNIS, MT 59729

MARNIE SMITH
288 AXOLOTL LAKES RD
ENNIS, MT 59729

Priority Date: DECEMBER 31, 1961

Type of Historical Right: USE

Purpose (Use): STOCK

***Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

***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:** MORAN CREEK

Source Type: SURFACE WATER

SOURCE ORIGINATES FROM A NATURAL LAKES KNOWN AS AXOLOTL LAKES.

***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		SENE	9	7S	2W	MADISON

Period of Diversion: MAY 1 TO NOVEMBER 1

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

2		N2	10	7S	2W	MADISON
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***Period of Diversion:** MAY 1 TO OCTOBER 1

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: MAY 1 TO NOVEMBER 1

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			SENE	9	7S	2W	MADISON
2			N2N2	10	7S	2W	MADISON