

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
BLACKFOOT RIVER - BASIN 76F

* * * * *

CLAIMANT: M & J Investments

CASE 76F-6003-A-2024
76F 108003-00

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 to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail 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

On November 27, 2024 M & J Investments' Motion To Amend Water Right Claim 76F 108003-00 ["Motion"] was filed pursuant to section 85-2-233(6), MCA. The requested amendment is the addition of a second purpose, stockwater, to this irrigation claim. "This Motion does not request any other changes to the currently decreed elements of water right claim 76F 108003-00." Motion, page 1. The Motion is viewable in the Court's FullCourt Enterprise case management system.

APPLICABLE LAW

The Montana Water Court has jurisdiction to review a motion to amend pursuant to section 85-2-233(6), MCA.

Rule 15 M.R.Civ.P. restricts the scope of the amendments to the conduct, transaction, or occurrence set forth in the original pleading or, in other words, the “same set of operative facts as contained in the original pleading.” *Sooy v. Petrolane Steel Gas, Inc.*, 218 Mont. 418, 422-423 (1985). The requested amendment “merely makes more specific that which has already been alleged.” *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15 (1972).

Notice must be published by newspaper if the requested amendments “may adversely affect other water rights.” Section 85-2-233(6)(a)(i), MCA.

“Incidental stock use” was addressed in April 7, 2017 Order Denying Implied Claims And Order Adding Remarks in Case 41K-A3, *Broken O Land & Livestock LLC v. Tee Bar Ranch Co.*, 2017 Mont. Water LEXIS 10 at *3, 5, and 6. The Order states:

It is a common practice for livestock to access irrigation ditches while diversions are taking place for irrigation. If the stock use is limited and not exercised independently from the irrigation claim, it can be considered incidental to that primary use. If the claim is not in use for irrigation, the stock use cannot take place. Unlike an implied claim, the incidental use is not separate from the primary use and does not provide a basis for a call on other water rights.

The final decree for an existing water right can include “information necessary to fully define the nature and extent of the right.” Section 85-2-234(6)(i), MCA. When the historical use of an irrigation right includes incidental stock use, a remark noting this use can be appropriate.

* * * * *

In the present case, Broken O is seeking remarks noting incidental stock use as an alternative to implied claims. The record supports stock use as a historical practice within these irrigation claims. That stock use only occurs when water is diverted for irrigation and does not increase the amount of water diverted. Adding a remark acknowledging the historical practice would serve to more fully define the nature and extent of the rights.

At the same time, a remark noting incidental stock use must clearly state the inherent limitations that apply to this use. Incidental stock use does not expand the use of the original irrigation claim and can only take place when Broken O is diverting water for irrigation. Incidental stock use through these claims does not provide an independent basis for a call on other water rights.

* * * * *

THE INCIDENTAL USE OF THIS RIGHT FOR STOCK IS LIMITED TO TIMES WHEN WATER IS DIVERTED FOR IRRIGATION AND DOES NOT PROVIDE AN INDEPENDENT BASIS FOR A CALL ON OTHER WATER RIGHTS.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to 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 the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including claimants amending their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. As stated in the Motion, Statement of Claim 76F 108003-00 is for irrigation, describes the irrigation use, and makes no mention of stockwater use of the claimed right. However, the attached copy of the Notice Of Completion Of Groundwater Appropriation Without Well, filed with the Lewis and Clak County Clerk and Recorder in 1964, states “Stock water and irrigation during summer. Spring runs about 40 miner’s inches durin (sic) early part of summer, less toward fall.”

2. The change requested in the Motion arises out of the same conduct, transaction, or occurrence specified on the original Statement of Claim, is based on the same operative facts specified in the Statement of Claim, and merely makes more specific that which was already claimed on the original Statement of Claim.

3. The Statement of Claim and its attachments support stock use as an historical use of the claimed right. The stock use only occurs when water is diverted for irrigation and does not increase the amount of water diverted. The historical stock use should be recognized and memorialized by adding the incidental use remark as authorized in Case 41K-A3.

4. The Preliminary Decree states that the purpose is IRRIGATION. The following remark should be added to the purpose:

THE INCIDENTAL USE OF THIS RIGHT FOR STOCK IS LIMITED TO TIMES WHEN WATER IS DIVERTED FOR IRRIGATION AND DOES NOT PROVIDE AN INDEPENDENT BASIS FOR A CALL ON OTHER WATER RIGHTS.

CONCLUSIONS OF LAW

1. The requested amendment does not adversely affect other water rights as it does

not make any change to the actual historical use of the claimed right on the ground. Notice by publication of this amendment is not required. Section 85-2-233(6), MCA.

2. The requested amendment “merely makes more specific that which has already been alleged.” *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15 (1972).

3. The Motion is sufficient to contradict and overcome the prima facie claim as it appeared in the Preliminary Decree.

RECOMMENDATIONS

Based upon the above, this Master recommends that the Court grant the Motion to Amend this claim and make the change specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended change has been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service Via Electronic Mail:

Jeremy A. Michael
Cusick, Farve, Mattick & Refling, P.C.
PO Box 1288
Bozeman, MT 59771-1288
(406) 587-5511
office@cmrlawmt.com

\\JUDHLNSRV-DATA\Share\JUDGALH2OSRV (Datavol)\Share\WC-BASIN FOLDERS\76F\Cases\76F-6003-A-2024\6003A mr 2-3-25 jbc.docx.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BLACKFOOT RIVER
BASIN 76F**

Water Right Number: 76F 108003-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: M & J INVESTMENTS
PO BOX 713
LINCOLN, MT 59639-0713

Priority Date: DECEMBER 31, 1919

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

THE INCIDENTAL USE OF THIS RIGHT FOR STOCK IS LIMITED TO TIMES WHEN WATER IS DIVERTED FOR IRRIGATION AND DOES NOT PROVIDE AN INDEPENDENT BASIS FOR A CALL ON OTHER WATER RIGHTS.

Flow Rate: 289.00 GPM

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 5 - LOW

Maximum Acres: 17.00

Source Name: SPRING, UNNAMED TRIBUTARY OF WILLOW 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		SESWNW	2	13N	9W	LEWIS AND CLARK

Period of Diversion: MAY 1 TO OCTOBER 31

Diversion Means: HEADGATE

Period of Use: MAY 1 TO OCTOBER 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	10.00		NWNW	2	13N	9W	LEWIS AND CLARK
2	7.00		NENE	3	13N	9W	LEWIS AND CLARK

Total: 17.00