

MONTANA WATER COURT - YELLOWSTONE DIVISION
TONGUE RIVER ABOVE AND INCLUDING HANGING WOMAN CREEK-BASIN 42B

CLAIMANT: Hamiton Trust

OBJECTOR: Apsaalooke (Crow) Tribe

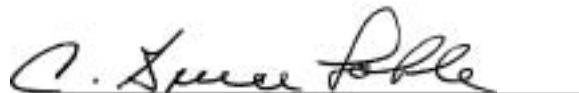
CASE **42B-3**
42B 39287-00

ORDER ADOPTING MASTER'S REPORT

Pursuant to Montana Code Annotated, § 85-2-233(5), the above entitled case was assigned to Senior Water Master Kathryn L. W. Lambert. The Senior Water Master filed a report containing Findings of Fact and Conclusions of Law with the Clerk of Court. Copies of the report were served upon the parties on June 7, 2012. Over ten (10) days have elapsed since service, and no objections to the Findings and Conclusions have been filed by any party.

The Court has reviewed the Senior Water Master's Findings, Conclusions, and Recommendations, and each Post Decree Abstract of Water Right Claim served with the report. Pursuant to Rule 53(e), Montana Rules of Civil Procedure, the Court **ADOPTS** the Master's Report and its Recommendations, and **APPROVES** the changes to the centralized computer record system that are reflected on each abstract served with the report.

DATED this 29 day of June, 2012.



C. Bruce Loble
Chief Water Judge


CERTIFICATE OF SERVICE

I, Jamie Pope, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **ORDER ADOPTING MASTER'S REPORT** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Hamilton Trust
c/o James S. and Marjorie K. Hamilton Trustees
HC 59 Box 13
Decker, MT 59025-9702

Nathan A. Espeland, Esq.
Espeland Law Office, PLLC
PO Box 1470
Columbus, MT 59019

DATED this *29th* day of *June*, 2012.



Jamie Pope
Deputy Clerk of Court

MONTANA WATER COURT - YELLOWSTONE DIVISION
TONGUE RIVER ABOVE AND INCLUDING HANGING WOMAN CREEK-BASIN 42B

CLAIMANT: Hamiton Trust

OBJECTOR: Apsaalooke (Crow) Tribe

CASE 42B-3
42B 39287-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Clerk of the Montana Water Court on the above stamped date. Please read this Report carefully.

If you disagree with the Master's Findings of Fact, Conclusions of Law, or Recommendations; or if there are errors in the Report, you may file a written objection to the Report within **10 days** from the above stamped date. (Rule 23, W.R.Adj.R.) If you file an objection, you must also 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

The Apsaalooke (Crow) Tribe objected to Hamilton Trust stock claim 42B 39287-00. The following issue remarks appeared on the abstract of this claim in the Preliminary Decree:

THE CLAIMED FLOW RATE EXCEEDS THE 35 GPM GUIDELINE FOR THIS PURPOSE AND CANNOT BE CONFIRMED DUE TO LACK OF DATA.

THE PRIORITY DATE MAY BE QUESTIONABLE. IT APPEARS THE FORM GW4, DECLARATION OF VESTED GROUNDWATER

RIGHTS, FILED JUNE 3, 1968 WAS USED IN LIEU OF A FORM GW2,
NOTICE OF COMPLETION OF GROUNDWATER APPROPRIATION.

On May 11, 2009 the claimant filed a Verified Motion to Amend Water Right Claim specifying reduction of the flow rate from 40.00 gpm to 20.00 gpm. As flow rate is at issue, this is deemed an affidavit rather than a motion to amend pursuant to section 85-2-233(6), MCA. On April 5, 2012 the claimant filed a letter stating that the priority date should be changed to June 8, 1968 and that the static level of the well should be 8 feet. On May 15, 2012 the Apsaalooke (Crow) Tribe filed a Withdrawal of Objection stating that the changes requested by the claimant resolve its objection.

FINDINGS OF FACT and CONCLUSIONS OF LAW

CONCLUSION OF LAW 1) The Montana Water Court has jurisdiction over all matters relating to the determination of existing water rights. Section 3-7-224, MCA.

CONCLUSION OF LAW 2) 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.

CONCLUSION OF LAW 3) The information in the claim file is sufficient to resolve the issue remark without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

FINDING OF FACT 1) The Preliminary Decree states that the flow rate is 40.00 gpm. The flow rate should be 20.00 gpm. The issue remark concerning the flow rate should be stricken from the abstract as addressed and resolved.

FINDING OF FACT 2) A copy of the Declaration of Vested Groundwater Right (GW4 form) is attached to the Statement of Claim. It identifies a well constructed in and first used in September 1967. The Clerk and Recorder stamp indicates this Declaration was filed on June 3, 1968.

CONCLUSION OF LAW 4) For groundwater appropriations between January 1, 1962 and July 1, 1973 a Notice of Appropriation and a Notice of Completion (GW2) both had to be filed in order to have the priority date relate back to when the water was first

diverted and used. Sections 89-2912 and 89-2913, RCM. If only a Notice of Completion was filed, the priority date is the date the Notice of Completion was filed. Section 89-2913(e), RCM. For groundwater appropriations made prior to January 1, 1962, a Declaration of Vested Groundwater Rights could be filed. Sections 89-2913(h), RCM. FINDING OF FACT 3) As the claimed priority date - date of first use - is after January 1, 1962, the appropriate documents to be filed are either a Notice of Appropriation and a Notice of Completion, or, a Notice of Completion. In this instance, the Declaration of Vested Water Rights form was completed and filed rather than the Notice of Completion form.

CONCLUSION OF LAW 5) Until a Notice of Completion is filed for any use of groundwater instituted after January 1, 1962, "no right to that use of water shall be recognized." Section 89-2913(e), RCM. The question is whether a Declaration of Vested Groundwater Rights form can be treated as the Notice of Completion.

CONCLUSION OF LAW 6) The statutes require specific details on the Notice of Completion forms and on the Declaration of Vested Groundwater Rights forms. Section 89-2913, RCM. A comparison of the information required for each of the forms shows that the information required is substantially identical with the following exception: the Notice of Completion requires the additional details about drilling the well which are not required on the Declaration. This makes sense. The Notice of Completion is for a contemporary drilling and the information is readily available. The drilling information for a well drilled prior to January 1, 1962 may no longer be available.

CONCLUSION OF LAW 7) Where the information furnished on the two forms is substantially identical, allowing the printed designation and name of the form to control over the substance of the information provided is the unwarranted elevation of form over substance. See *In re the Charles M. Bair Family Trust*, 2008 MT 144, 743, 343 Mont. 138, 183 P.3d 61; *Yurczyk v. Yellowstone County*, 2004 MT 3, 722, 319 Mont. 169, 83 P.3d 266. For a Declaration of Vested Groundwater Rights to be considered as a Notice of Completion simply filed on the wrong form, the information provided on the form

must meet the statutory requirements for a Notice of Completion.

FINDING OF FACT 4) In this instance, the Declaration of Vested Groundwater Rights attached to the Statements of Claim meets the statutory requirements for a Notice of Completion concerning the water right but does not meet the statutory requirements as to some of the drilling information. The missing information is: the name address and license number of the driller; the approximate surface elevation at the well head; the casing record; and, the drilling log showing the character and thickness of all formations penetrated. As the missing information involves no element of a water right, allowing the printed designation and name of the form to control over the substance of the information provided is the unwarranted elevation of form over substance. The content of this Declaration does meet the core water right requirements for a valid Notice of Completion.

CONCLUSION OF LAW 8) The Declaration of Vested Groundwater Rights attached to these Statements of Claim does qualify as a Notice of Completion.

FINDING OF FACT 5) The Preliminary Decree states that the priority date is September 15, 1967 and the type of historical right is use. The priority date should be June 3, 1968 (the date the Declaration was filed) and the type of historical right should be filed. The issue remarks concerning the priority date and groundwater form filed should stricken as addressed and resolved.


FINDING OF FACT 6) The well data includes the static water level. That data is not included on the Water Court abstracts but is included on the DNRC General Abstract. That data currently states that the static water level is 40.00 feet. The static water level should be 8.00 feet.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Temporary Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized water right record system. As the static water level is not included

on a Post Decree Abstract, a copy of the General Abstract is also enclosed so the parties can see that it has been changed as requested.

DATED this 7 day of June, 2012.


Kathryn L. W. Lambert
Senior Water Master

CERTIFICATE OF SERVICE

I, Jamie Pope, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **NOTICE OF FILING OF MASTER'S REPORT** and **MASTER'S REPORT** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Hamilton Trust
c/o James S. and Marjorie K. Hamilton Trustees
HC 59 Box 13
Decker, MT 59025-9702

Nathan A. Espeland, Esq.
Espeland Law Office, PLLC
PO Box 1470
Columbus, MT 59019

DATED this 7th day of June, 2012.


Jamie Pope
Deputy Clerk of Court

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TONGUE RIVER, ABOVE & INCLUDING HANGING WOMAN CREEK
BASIN 42B**

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 42B 39287-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: HAMILTON TRUST
%JAMES S & MARJORIE K HAMILTON TRUSTEES
HC 59 BOX 13
DECKER, MT 59025 9702

"Priority Date: JUNE 3,1968

***Type of Historical Right:** FILED

Purpose (use): STOCK

***Flow Rate:** 20.00 GPM

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: GROUNDWATER

Source Type: GROUNDWATER
ALSO KNOWN AS HAMILTON WELL

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		NWSENE	11	8S	38E	BIG HORN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

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			NWSENE	11	8S	38E	BIG HORN

Remarks:

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
1424 9TH AVENUE P.O.BOX 201601 HELENA, MONTANA 59620-1601

GENERAL ABSTRACT

See most recent version for current wafer right details.

Water Right Number: 42B 39287-00 STATEMENT OF CLAIM
Version: 2 -- POST DECREE
Version Status: ACTIVE

Owners: HAMILTON TRUST
%JAMES S & MARJORIE K HAMILTON TRUSTEES
HC 59 BOX 13
DECKER, MT 59025-9702

Priority Date: JUNE 3, 1968
Enforceable Priority Date: JUNE 3, 1968

Type of Historical Right: FILED

Purpose (use): STOCK

Maximum Flow Rate: 20.00 GPM

Maximum 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: GROUNDWATER
Source Type: GROUNDWATER
ALSO KNOWN AS HAMILTON WELL

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr.</u> <u>Sec</u>	<u>Sec</u>	<u>Tw</u> <u>p</u>	<u>Rge</u>	<u>County</u>
1		NWSENE	11	8S	38E	BIG HORN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

Well Depth: 45.00 FEET

Static Water Level: 8.00 FEET

Casing Diameter: 6.00 INCHES

Period of Use: JANUARY 1 to DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr.</u> <u>Sec</u>	<u>Sec</u>	<u>Tw</u> <u>p</u>	<u>Rge</u>	<u>County</u>
1			NWSENE	11	8S	38E	BIG HORN

Geocodes/Valid: 22-0291-11-1-04-02-0000 - Y

Remarks:

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

OWNERSHIP UPDATE RECEIVED

OWNERSHIP UPDATE TYPE 608 # 19367 RECEIVED 12/01/2004.