

FEB 15 2017

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
RUBY RIVER BASIN (41C)

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CLAIMANT: Peterson Ranch LLC

41C-260
41C 130162-00
41C 130163-00
41C 130170-00
41C 130176-00

**ORDER GRANTING MOTION TO AMEND IN PART AND ORDER CLOSING
CASE**

I. INTRODUCTION

This Order concerns irrigation claims 41C 130162-00, 41C 130163-00, 41C 130170-00, and 41C 130176-00, which all claim a water right decreed to Federal Land Bank in *Dauterman v. Federal Land Bank*, Fifth Judicial District, Madison County, Cause No. 3089. Part of this Decree, known as the Ruby River Decree, granted 240 miner's inches of water from California Creek to the Federal Land Bank with a priority date of June 20, 1918. Claims 41C 130163-00, 41C 130170-00, and 41C 130176-00 claim 8.55 CFS, or 342 miner's inches, from California Creek, while claim 41C 130162-00 claims 3.5 CFS, or 140 miner's inches, from Harris Creek. Together, 41C 130162-00, 41C 130163-00, 41C 130170-00, and 41C 130176-00 claim 482 miner's inches of water, exceeding the 240 miner's inches allotted to the decreed right. The Water Court consolidated these claims into case 41C-260 to resolve the issue remarks and decree exceeded issue.

II. BACKGROUND

The Basin 41C Temporary Preliminary Decree was issued on November 14, 1990.

The abstracts of claims 41C 130162-00, 41C 130163-00, 41C 130170-00, and 41C 130176-00 contained the following issue remark in the Temporary Preliminary Decree for Basin 41C:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMLERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 240.0 MINERS INCHES DECREED IN CASE NO. 3089.

In addition, claim 41C 130163-00 had a second issue remark:

THIS CLAIM PRESENTS ISSUES OF FACT AND LAW THAT MAY BE ADDRESSED AT THE OBJECTION STAGE. IT APPEARS THAT 26.3 ACRES ARE ACTUALLY IRRIGATED AND PROBLEMS COULD EXIST WITH FLOW RATE AND VOLUME. TO ASSURE THE ORDERLY ADMISNISTRATION OF WATER RIGHTS, THE WATER COURTS WILL SET A HEARING TO DETERMINE THESE ISSUES IF NO OBJECTIONS ARE MADE.

The Basin 41C Temporary Preliminary Decree objection list provided notice to other water users of possible modifications to several elements of these water rights.

These claims were consolidated into case 41C-260 on December 16, 2008 and the claimants were required to meet with personnel from the Montana Department of Natural Resources and Conservation (DNRC) to resolve the issue remarks. On May 14, 2009, after claimant contact, a DNRC water resource specialist submitted a memorandum containing the following proposed changes to these water rights:

41C 130162-00:

Amend type of historical right from decreed to use right.

41C 130163-00:

Amend place of use acreage from 30 to 26.3 acres.

41C 130170-00:

Amend point of diversion to NWSENE Sec. 27, Twp. 5S, Rge. 4W.¹

¹ As originally claimed on the Statement of Claim, the point of diversion was the SENWNE Sec. 28, Twp. 5S, Rge. 4W. This is how the claim appeared in the 41C Temporary Preliminary Decree. During the claimant's consultation with the DNRC in 2009, the DNRC examined aerial photographs which indicated the point of diversion is actually in NWSENE Sec. 27, Twp. 5S, Rge. 4W. The claimant submitted an Amendment to Statement of Claim, which was

41C 130176-00:

Amend the flow rate from 6 CFS to 3.45 CFS.

On November 30, 2009, claimants filed a withdrawal of their amendment to claim 41C 130162-00. The withdrawal of the 2009 amendment to 41C 130162-00 meant the combined flow rate of Peterson's four claims still exceeded the decreed amount. The flow rate reduction to claim 41C 130176-00 would have brought the combined flow rate of all four Peterson rights to 9.5 CFS, or 380 miner's inches, which was still above the 240 decreed inches. No further proceedings occurred to resolve the issues until 2016, at which time the Court issued an order stating the reduction to claim 41C 130176-00 did not resolve the decree exceeded issue. On October 31, 2016, Peterson filed a motion to amend 41C 130162-00. The 2009 and the 2016 motions to amend are currently before the Court.

III. STANDARD OF REVIEW

Issue remarks not resolved through the objection process are to be resolved using the process provided in Section 85-2-248, MCA. A properly filed Statement of Claim for Existing Water Right is *prima facie* proof of its content. § 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. The Montana Water Court is permitted to use information submitted by the Montana 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. § 85-2-231(2), MCA. 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. § 85-2-247(2), MCA. All issue remarks must be resolved before the issuance of a final decree for a basin. § 85-2-234(1), MCA.

attached to the DNRC's May 14, 2009 memorandum. The claimant's Amendment requested the point of diversion be changed to the SWSENW Sec. 27, Twp. 5S, Rge. 4W.

After the issuance of a temporary preliminary decree or preliminary decree, notice of any motion to amend a statement of claim or a timely filed objection that may adversely affect other water rights is published in the form of an objection list. The objection list provides notice to water users that a particular element of a claim may change during adjudication of the claim. § 85-2-233(6), MCA

IV. ISSUES AND ANALYSIS

1. Did the 2016 amendment of claim 41C 130162-00 adequately resolve the decree exceeded issue remarks for the four Peterson claims?

Decree exceeded problems arise when the combined flow rates of two or more water rights exceed the flow rate of the underlying decreed right upon which they are based.

Amendments to water rights that seek to expand an element of a claim, and thereby have the potential to adversely affect another water right, typically require public notice pursuant to Section 85-2-233(6), MCA. The water rights subject to this Order received decree exceeded issue remarks in the Temporary Preliminary Decree, giving individuals notice of the issue. In addition, Peterson's 2016 amendment contained an extensive service list of individuals from the area providing notice to those individuals. However, Peterson is not seeking to expand any element of claim 41C 130162-00. Peterson is only seeking to amend the type of right. The Court finds no potential to adversely affect another water right and therefore no additional public notice is necessary.

The Ruby River Decree states 240 miner's inches of California Creek water were appropriated from a point where the creek intersects the west boundary of Section 28, Township 5 South, Range 4 West on June 20, 1918. The Decree does not mention Harris Creek.

According to the maps in the claim file, the Harris Creek right has a point of diversion which drops water into California Creek about 1.5 miles upstream of the confluence of the two creeks. The Court disagrees with Peterson's characterization of Harris Creek as a separate drainage from California Creek and the Ruby River. The claim

file maps clearly show Harris Creek drains into California Creek, which eventually flows into the Ruby River.

Regardless of these facts, this Court agrees with Peterson's position that claim 41C 130162-00 should be considered a separate water right from the decreed 240 miner's inches from California Creek. The Decree lists several specific tributaries of the Ruby River by name, but this does not mean the Decree intended to encompass every Ruby River tributary, or all the water rights from those tributaries. Peterson's diversion of Harris Creek water to California Creek enables Peterson to divert Harris Creek water to the place of use for claim 41C 130162-00 only. California Creek is only a vessel for Harris Creek water and therefore claim 41C 130162-00 is not a part of the California Creek water distributed in the Ruby River Decree.

The portion of Peterson's motion to amend 41C 130162-00 to a use right is accepted. Because 41C 130162-00 is not based on the Ruby River Decree, only the three California Creek claims, 41C 130163-00, 41C 130170-00, and 41C 130176-00, must not exceed the 240 miner's inches granted in the Decree. Peterson's 2009 amendment to reduce the flow rate of 41C 130176-00 would bring the three California Creek claims into compliance with the 240 miner's inches allotted in the Ruby River Decree. Therefore, the decree exceeded issue remark is resolved.

2. Should the Court accept Peterson's proposed priority date of June 20, 1918 for the 41C 130162-00 use right?

As stated above, this Court accepts Peterson's amendment to 41C 130162-00 in part by changing the type of right from decreed to use. The Court must now decide when claim 41C 130162-00 was first put to beneficial use.

Peterson's amendment does not address the priority date of this claim other than stating the priority date would remain at June 20, 1918, like the remaining three California Creek claims. However, as discussed above, claim 41C 130162-00 is not a part of the Ruby River Decree. Therefore, additional evidence is required to support a June 20, 1918 priority date.

A use right is a claimed existing water right perfected by appropriating and putting water to beneficial use without written notice, filing, or decree. Rule 2, W.R.C.E.R.

The 2009 DNRC memorandum to the Court states the Madison County Water Resources Survey photograph from October 10, 1951 indicates that the diversion has been in use since at least the date of the photograph. Claim 41C 130162-00 is the only irrigation claim on Harris Creek. Given these facts and the fact that claimant provided no evidence supporting the date of irrigation from Harris Creek, the priority date for claim 41C 130162-00 is changed to October 10, 1951.

3. Did Peterson's 2009 amendments resolve the remaining issues with the three California Creek claims?

41C 130163-00:

Peterson's amendments from 2009 are approved and implemented.² The amendment to 41C 130163-00 reduced the place of use from 30 to 26.3 acres. No review or determination of the burden of proof is required pursuant to Rule 17(c), W.R.Adj.R. because the claimant has agreed to reduce or limit an element of the claim. The Water Court may accept a claimant's requested reduction or limitation without further presentation of evidence. Rule 17(c), W.R.Adj.R.

41C 130170-00:

Peterson provided no further information necessary to amend the point of diversion on claim 41C 130170-00 to SWSENW Sec. 27, Twp. 5S, Rge. 4W. DNRC examination showed the diversion in NWSENE Sec. 27, Twp. 5S, Rge. 4W. Information in the claim file, Peterson's 2009 Amendment, and the DNRC memorandum are consistent and indicate the originally-claimed point of diversion in the SENWNE Sec. 28 is incorrect. The map attached to the statement of claim, aerial photographs, and the DNRC memorandum show the actual point of diversion for claim 41C 130170-00 is NWSENE Sec. 27, Twp. 5S, Rge. 4W.

² The 2009 amendment to 41C 130162-00 will not be implemented as Peterson withdrew it on November 30, 2009.

41C 130176-00:

Peterson's motion to amend the flow rate on this claim from 6 CFS to 3.45 CFS brings the flow rate for the remaining decreed claims 41C 130163-00, 41C 130170-00 and 41C 130176-00 within the decreed amount of 240 miner's inches, or 6 CFS.

V. CONCLUSION AND ORDER

The issue remarks relating to an over-claimed decreed right were resolved by Peterson's amendments. As a result of the proposed changes, the decree exceed issue remark should be removed from these claims.

The Court accepts part of the amendment of claim 41C 130162-00 to amend the type of right from decreed to use but rejects Peterson's proposed priority date of June 20, 1918 and instead implements the priority date of the first known use: October 10, 1951. The Court further approves and implements Peterson's amendment to claim 41C 130163-00 to resolve all issue remarks for all four claims. The corrections to 41C 130170-00 and 41C 130176-00 are also implemented. Post Decree Abstracts of Water Right Claims are served with this Order to confirm these recommendations have been incorporated into Montana's water right claims record system.

41C 130162-00:

Priority Date: ~~June 20, 1918~~ **October 10, 1951**

Type of Historical Right: ~~DECREED~~ USE

41C 130163-00:

Maximum Acres: **30.00 26.30**

Place of Use:

ID	Acres	Qtr Sec	Sec	Twp	Rge	County
1	25	N2SW	27	5S	4W	MADISON
2	<u>5.00 1.30</u>	NENESE	28	5S	4W	MADISON

Total: **30.00 26.30**

41C 130170-00:

Point of Diversion:

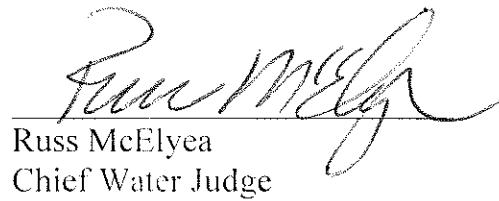
Qtr Sec	Sec	Twp	Rge	County
SENWNE NWSENE	28 27	5S	4W	MADISON

41C 130176-00:

Flow Rate: ~~6.00 CFS~~ **3.45 CFS**

It is ORDERED case 41C-260 is CLOSED.

DATED this 15 day of February, 2017.



Russ McElyea
Chief Water Judge

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