

IN THE WATER COURTS OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
GALLATIN RIVER BASIN (41H)  
\* \* \* \* \*

FILED

DEC 14 1990

NOTICE OF FILING OF MASTER'S REPORT

Montana Water Court

TO: ALL PARTIES

RE: Case No. 41H-4

This is to provide you with Notice that the Water Master has filed a Master's Report (Findings of Fact and Conclusions of Law) with the Clerk of the Water Court for the water right(s) listed above. A copy of the Master's Report is enclosed with this Notice.

Please review this Master's Report carefully. If there are any corrections or changes that need to be made, you have 10 days from receipt of this Notice to file a written objection. You must mail a copy of your written objection to all the other parties who have been involved in this proceeding and file a certificate of such mailing with the Water Court.

(This procedure is required by Rule 1.II. Water Right Claims Examination Rules and in Rule 5 and 53 of the Montana Rules of Civil Procedure.)

DATED this 14th day of December, 1990.

LORI M. BURNHAM  
Clerk of Court  
Montana Water Court  
P. O. Box 879  
Bozeman, MT 59771-0879  
(406) 586-4364  
1-800-624-3270 (in Montana)

IN THE WATER COURTS OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
GALLATIN RIVER BASIN (41H)

\* \* \* \* \*

IN THE MATTER OF THE ADJUDICATION OF ) Case No. 41H-4  
THE EXISTING RIGHTS TO THE USE OF ALL )  
THE WATER, BOTH SURFACE AND UNDERGROUND, ) 41H-W-003805-00  
WITHIN THE GALLATIN RIVER DRAINAGE AREA )  
INCLUDING ALL TRIBUTARIES OF THE )  
GALLATIN RIVER IN GALLATIN, PARK AND )  
MADISON COUNTIES, MONTANA. )

CLAIMANT: A. James & Erma H. Kurk

OBJECTOR: Frank Morgan

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MASTER'S REPORT

Montana Water Court

STATEMENT OF THE CASE

A Hearing in the above entitled matter was held on June 27, 1990, before Water Master Patti L. Rowland. Claimants A. James and Erma H. Kurk were present and appeared on their own behalf. Objector Frank Morgan and his wife, Nancy Morgan were present and appeared on their own behalf. George Wood was present and appeared as a witness for claimants.

Claimant's exhibits 1 and 4 were admitted into evidence without objection. The Court ruled that claimant's exhibits 2, 3, 5, 6 and 7 were heresay and would not be admitted into evidence.

Objector's exhibits B, D, E, F and G were allowed into evidence without objection. The Court ruled that exhibit A would not be allowed into evidence as it was heresay. The Court took judicial notice of Objector's exhibit C.

The dispute between the parties as to the correct source for water right claim 41H-W-003805-00 is whether the claimants have a water right from "West Spring Creek" (objector's contention) or a water right from "East Spring Creek" (claimant's contention). From the testimony presented, the objector and claimants agree there are two separate sources: one they identify as "West Spring Creek" and the other as "East Spring Creek", both tributaries of Bear Creek.

From the testimony at hearing, the claimants and objector agree that both "East Spring Creek" and "West Spring Creek" arise on Section 26, T02S, R06E. "East Spring Creek" arises on and flows through the objector's property and flows into Bear Creek but never flows on the claimants' property. "West Spring Creek" also arises on objector's property in Section 26 and flows through objector's property and onto claimants' property in Section 23 before flowing into Bear Creek.

The objector asserts that claimants' point of diversion for the Spring Creek water right, as indicated on water right claim 41H-W-003805-00, should not be the same point of diversion as used for claimants' Bear Creek water right. Objector contends there are two separate diversion points, one for Spring Creek water and a second point of diversion for Bear Creek water. For this position, objector relies on the language in the Findings of Fact in Lee et al. v. Wolverton et al. (1903), Gallatin County, Case No. 3206 which refers to the point of diversion for the Spring Creek water as "which ditch diverts the water from said stream or Spring Creek at a point upon its East bank in the

Southwest quarter of Section 23 in said Township and Range and runs thence in a Northeasterly direction about 75 yards..." and the language referring to the point of diversion for Bear Creek water as being diverted "by means of a ditch running in a general Northeasterly direction...". See Objector's Exhibits E and F.

For the position that the Spring Creek water right and Bear Creek water right have the same point of diversion (out of Bear Creek) claimants rely on the language in the Conclusion of Law and Decree in Case No. 3206 which states "to the use of and to use all the water of that certain Spring Creek rising in Section 26, Township 2 South of Range 6 East and flowing into said Bear Creek...". See Objector's Exhibit F.

Claimant Erma H. Kurk, 60 years old, testified that she has lived her entire life in the Bear Creek area and has never used water from "West Spring Creek". Claimant James Kurk testified that he has lived on the property approximately 40 years and has never seen any evidence of a ditch out of "West Spring Creek" which would have irrigated any of the claimants' property. James Kurk did testify, however, that there does appear to be an old ditch running in a northeasterly direction which took water out of the east side of Bear Creek.

Objector's Exhibit D is the Affidavit of C. W. Rosenberg which refers to "East Spring Creek" as "Sunnybrook Branch". It was the opinion of Mr. Rosenberg that the claimants water right was out of "West Spring Creek" rather than "Sunnybrook Branch" or "East Spring Creek". To rebutt this

evidence, claimants introduced Exhibit #1 contending that the Notice of Water Right shows the source known as "Sunnybrook Branch" as being located in the NESE of Section 23, T02S, R06E. Claimant A. James Kurk testified that the NESE of Section 23 is 1/4 to 1/2 mile away and therefore "Sunnybrook Branch" is a different source than "East Spring Creek".

From the broad legal description of the land owned by Angie Reynolds at the time of the Lee v. Wolverton decree, Angie Reynolds might have owned a total of 240.00 acres in Sections 22 and 23 T02S, R06E of which approximately 160.00 of those acres could have been located in Section 23. Finding of Fact #15 in Case No. 3206 states that the Spring Creek "water right became and at the time of the commencement of this action was, and now is, appurtenant to said land". Even though the water right was decreed to be appurtenant to the acreage owned by Angie Reynolds, the decree was not specific as to the exact place of use of the Spring Creek water. Claimants' claim historical irrigation of 28.00 acres located in Section 23. From the evidence presented, very little acreage is irrigable with water from "West Spring Creek". Testimony presented indicates that for the claimant to use "West Spring Creek" water as the source of irrigation, a diversion would need to be present on the east bank of West Spring Creek.

Upon careful consideration and review of the case, claim file, evidence and testimony presented at hearing, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Water right claim 41H-W-003805-00 was filed by A. James and Erma H. Kurk (claimants) for irrigation. The claimed source is "A Certain Spring Creek", tributary of Bear Creek. This claim appeared in the Temporary Preliminary Decree for the Gallatin River Basin (41H). The source was listed as an Unnamed Tributary of Bear Creek.

2. On June 24, 1986, Frank Morgan (objector) filed an objection to water right claim 41H-W-003805-00. The basis of the objection was the claimed source.

3. The basis of this water right is 50.00 miner's inches decreed to Angie Reynolds in Lee et al. v. Wolverton et al., (1903), Case No. 3206, Gallatin County. The source of the Reynolds right is described in this decree as water from a "certain spring creek". Angie Reynolds was also decreed 50.00 miner's inches of water from Bear Creek. Claimants' water right claim 41H-W-003804-00 which reflects the "Bear Creek" right has not been objected to and is not at issue.

4. The language contained in the Findings of Fact in decree No. 3206 is as follows:

14. That the intervenor Angie Reynolds on the 24th day of June 1892, by means of a ditch running in a general northeasterly direction, diverted and appropriated 50 inches of the waters of said Bear Creek for the purpose of irrigating her said above described lands, and by such appropriation and diversion aforesaid, acquired a water right for the irrigation of said land, which water right became and at the time of the commencement of this action was, and now is, appurtenant to said land.

15. That on the 24th day of June, 1893, the intervenor Angie Reynolds by means of a ditch diverted and appropriated all of the waters of a certain Spring Creek rising in Section 26 Township 2 South of Range 6 East and flowing into said Bear Creek mentioned in the Complaint, said waters amounting to about 50 inches, statutory measurement, which ditch diverts the water from said stream or Spring Creek at a point upon its East bank in the Southwest quarter of Section 23 in said Township and Range and runs thence in a Northeasterly direction about 75 yards to, and upon the said real estate of said intervenor Angie Reynolds, and the same was so appropriated and diverted for the purpose of irrigating the said real estate of said intervenor, and by such appropriation and diversion aforesaid, acquired a water right for the irrigation of said land, which water right became and at the time of the commencement of this action was, and now is, appurtenant to said land. (Emphasis supplied). See Objector's Exhibit F.

5. The fifth Conclusion of Law and Decree in Case No. 3206 summarized the water rights decreed to Angie Reynolds as follows:

5. That intervenor Angie Reynolds is the owner and entitled to use 50 inches of the waters of Bear Creek appropriated on the 24th day of June, 1892, by means of a ditch running in a general northeasterly direction for the purpose of irrigating the south half of the north half of Section 23, and the south half of the northeast quarter of Section 22, all in Township 2 South of Range 6 East in said County and State and is also the owner and entitled to the use of and to use all the water of the certain Spring Creek rising in Section 26, Township 2 South of Range 6 East and flowing into said Bear Creek, amounting to 50 inches, statutory measurement, and is entitled to the sole and exclusive use of and to use all of the waters of said Spring Creek and the ditch through which it is diverted as against all the world, and is entitled to decree and injunction accordingly. (Emphasis supplied).

6. The claimants are successors to the water rights decreed to Angie Reynolds.

7. After review of the Findings of Fact and Conclusions of Law in Case No. 3206, the Master finds that the decree issued in the case of Lee v. Wolverton is inconclusive on its face as to whether "East Spring Creek" or "West Spring Creek" was intended as the source for Spring Creek water decreed to Angie Reynolds.

8. At the hearing in this matter, there was no evidence or testimony presented to show that there was ever a ditch or diversion from the east bank of "West Spring Creek".

9. From the conflicting evidence presented, the Water Master cannot find that "Sunnybrook Branch" and "East Spring Creek" are the same source.

10. Water right claim 41H-W-003805-00 is a direct flow irrigation right that is susceptible to measurement by flow rate.

#### CONCLUSIONS OF LAW

##### I.

The Water Court has jurisdiction to review all objections to temporary preliminary decrees pursuant to Mont. Code Ann. Sec. 85-2-233.

##### II.

Water right claim 41H-W-003805-00 is a claim of an existing right filed in accordance with Section 85-2-221 and such statement of claim of existing right constitutes prima facie proof of its content. See Mont. Code Ann. Sec. 85-2-227. "Prima facie evidence" is that which proves a particular fact until contradicted and overcome by other evidence. Mont. Code Ann.



Sec. 26-1-102(6). The objector, therefore, has the burden of proof and must actually overcome the facts stated in the claim of existing water right. The evidence presented at hearing did not overcome the prima facie status of water right claim 41H-W-003805-00.

III.

The abstract for water right claim 41H-W-003805-00 will appear in the Preliminary Decree for the Gallatin River Basin (41H) as it appeared in the Temporary Preliminary Decree for the Gallatin River Basin (41H). The source shall remain as claimed.

IV.

As water right claim 41H-W-003805-00 is a direct flow irrigation right which is susceptible to measurement by flow rate, the volume quantification shall be removed pursuant to Mont. Code Ann. Sec. 85-2-234(6)(b).

DATED this 14<sup>th</sup> day of December, 1990.

Patti J. Rowland  
Patti L. Rowland  
Water Master

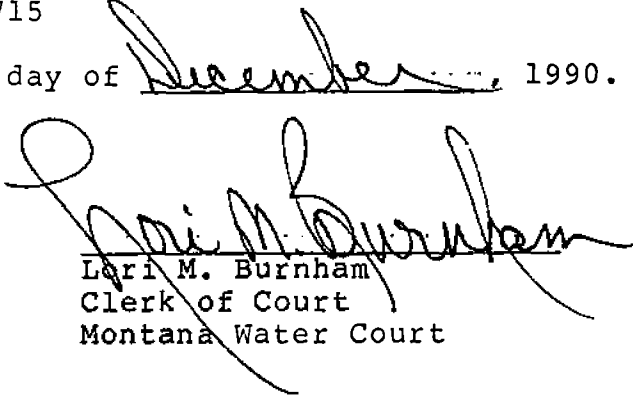
CERTIFICATE OF SERVICE

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

A. James & Erma H. Kurk  
433 Bear Canyon Road  
Bozeman, MT 59715

Frank Morgan  
1300 Mount Ellis Road  
Bozeman, MT 59715

DATED this 14 day of December, 1990.

  
Lori M. Burnham  
Clerk of Court  
Montana Water Court