

Montana Water Court
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FILED
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Montana Water Court

**IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MADISON RIVER BASIN (41F)**

CLAIMANTS: Valley Garden Ranch LLC

CASE 41F-A12

OBJECTORS: Janet M. Endecott; Cline J. Oliver;
Wyatt Gibbs

41F 3482-00 41F 3485-00
41F 3483-00 41F 3486-00
41F 3484-00 41F 3487-00

**ORDER GRANTING MOTION TO AMEND
PERIOD OF DIVERSION AND PERIOD OF USE**

Procedural History

Claimant Valley Garden Ranch LLC (VGR) filed two motions to amend the above captioned claims. VGR published notice of the motions and served individual notice on all South Meadow Creek water right claim owners. Several parties filed objections to the motions. Objections filed by Claudette Hughes (Seven Bar Ranch LLC), and Greg Doud (Ramshorn Ranch LLC) were subsequently withdrawn. On August 12, 2015, VGR filed a Notice of Settlement stating that it had reached an agreement on all issues with objector Janet M. Endecott. The agreement has not been filed with the Water Court. Endecott did not participate in subsequent Water Court proceedings. Objections filed by Lawrence Gibbs (assumed by Wyatt Gibbs) and Cline J. Oliver were not resolved. Gibbs and Oliver were jointly represented at hearing.

VGR's first motion, filed on June 30, 2014, requested a permanent flow rate increase for each right to provide for conveyance loss. The conveyance loss issue was

first addressed on these claims in Water Court case 41F-59. (Master's Report and Order Adopting Report issued September 21, 1987). As a result of proceedings in that case, the claims received an information remark that provided for carriage loss but required annual estimates for that additional flow. The VGR motion sought to replace these remarks with a permanent flow rate increase. Objectors Gibbs and Oliver acknowledged VGR was entitled to carriage loss but opposed a permanent flow rate increase.

VGR subsequently amended the motion and sought to replace the original information remark with a revised information remark. On February 3, 2016, the Court issued an Order on Summary Judgment that granted VGR's motion on this issue.

Pursuant to that order, all six claims received the following information remark:

THE FLOW RATE FOR THIS CLAIM SHALL BE MEASURED AT OR ABOUT THE POINT WHERE THE CONVEYANCE DITCH CROSSES THE CLAIMANT'S PROPERTY LINE IN THE SESENW, §6, T5S, R1W, MADISON COUNTY. SEE THE CLAIM FILE OR WATER COURT CASE 41F-A12 FOR MORE INFORMATION.

The February 3, 2016 Order resolved all issues on the claims regarding flow rate and conveyance loss.

VGR's second motion, filed on August 18, 2014, seeks to change the period of diversion/use for the same six water right claims.¹ The current period of diversion/use on all claims is May 1 to September 19. VGR requests a period of diversion/use from April 20 to October 14 for claims 41F 3482-00, 41F 3483-00, and 41F 3484-00, and a period of diversion/use from April 1 to June 15 for claims 41F 3485-00, 41F 3486-00, and 41F 3487-00.

The February 3, 2016 Order on Summary Judgment denied summary judgment on the period of diversion/use issue. Hearing on this issue took place on May 18, 2016 in Virginia City, Montana. VGR submitted evidence and testimony supporting its motion. Objectors Gibbs and Oliver submitted evidence and testimony opposing the motion. By

¹ All six claims are direct flow irrigation. This means that their period of diversion and period of use are the same. This decision typically refers to period of use because that is the way the testimony at hearing was framed. The decision also refers to period of diversion/use which is a way to identify both claim elements. Either phrase is intended to refer to both period of diversion and period of use.

agreement, on June 13, 2016, VGR filed Exhibit VGR-31 as a supplement to Exhibit VGR-7. Both exhibits include water commissioner records for South Meadow Creek. Exhibit VGR-31 is a more complete record of commissioner entries.

The parties filed Proposed Findings of Fact and Conclusions of Law on August 8, 2016.

Evidentiary Issue

At hearing, Objectors Gibbs and Oliver objected to VGR Exhibit-7, which is selected commissioner records from the South Meadow Creek Decree (*Morrison v. Higbee*, Cause 1183, Madison County, 1912). The initial objection was that VGR-7 was not a complete copy of decree billing information for the months of April and September. The exhibit only contained those records that supported VGR's contentions. This objection was resolved by the parties with VGR agreeing to provide a full copy of the commissioner billing records for the pertinent months. VGR did so on June 13, 2016 when it filed VGR-31.

The Objector's second objection was that page 1 of VGR-7 (page 24, VGR-31) is inadmissible because it was not signed by the commissioner. This page is the April 13 to April 30 billing record for 1934. The Court did not rule on this issue at hearing because VGR suggested the other pages that were part of the 1934 commissioner billing record were probably signed. In post-hearing briefing, the Objectors renewed this objection asserting that the additional pages were not signed by the commissioner and the document was therefore hearsay. A review of VGR-31 confirms the 1934 April billing record is not signed.

While this page of the commissioner billing records is not signed, it is part of the record kept by the Clerk of Court. As such, it falls under the exception to hearsay for public records and reports. Rule 803(8), M.R.Evid. It also has the circumstantial guarantees of trustworthiness contemplated as an exception to hearsay in Rule 804(b)(5), M.R.Evid. The Court denies the objection to this page of the exhibits. The April 13-30,

1934 commissioner billing records are properly admitted into evidence and will receive the weight and credibility they deserve.

Standard of Review

A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA. Existing water rights are those rights that were acquired prior to passage of the Montana Water Use Act in 1973. Section 85-2-102(12), MCA. *Teton Co-op Canal Co. v. Teton Coop Reservoir Co.*, 2015 MT 344, ¶ 20, 382 Mont. 1; 365 P.3d 442. A claimant seeking to amend a water right statement of 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. The claimant then has the burden to show, by a preponderance of the evidence, that the amendments they are seeking are an accurate reflection of historical use. The Montana Supreme Court has defined preponderance as “a relatively modest standard that the statutory criteria are "more probable than not" to have been met.” *Hohenlohe v. State*, 2010 MT 203 ¶ 33, 357 Mont. 438, 240 P.3d 628.

Issue Presented

What is the historical period of diversion for the six claims at issue in this case?

Findings of Fact

1. Claims 41F 3482-00, 41F 3483-00, 41F 3484-00, 41F 3485-00, 41F 3486-00, and 41F 3487-00 were filed by James Robertson for irrigation from South Meadow Creek. All six claims are based on water rights decreed by the Fifth Judicial District Court in *Morrison v. Higbee*, Cause 1183, Madison County, (1912). (VGR-3) Robertson claimed a May 1 to September 15 period of use for all six water rights. The statement of claim filings did not include any information indicating Robertson’s basis for this period of use. (VGR-17, 18, 19, 20, 21, and 22) During claim examination, the Montana

Department of Natural Resources and Conservation (DNRC) applied an “array” to period of use which means dates were standardized. As a result, the claims appeared in the Temporary Preliminary Decree for this basin with a May 1 to September 19 period of use. The DNRC did not add a separate period of diversion to the claims until 2008. That period of diversion matches the period of use.

2. *Morrison v. Higbee* decreed a priority date, flow rate, and means of diversion for a number of claims from South Meadow Creek. It did not address period of use. The district court subsequently issued rulings under the decree in 1977 (VGR-4) and 1986 (VGR-5). Neither of these decisions addressed period of use.

3. While there was some speculation, there was no evidence presented at hearing showing why Robertson chose the May 1 to September 15 period of use. Robertson was the property owner and presumably had knowledge of irrigation practices on the property. However, Robertson leased the property throughout his ownership. (VGA-30) Three of those lessees testified at hearing, Evan Andrene 1970-83, Earl Knighten 1983-93, and Boyd Van Fleet 1997-98. While all three lessees talked with Robertson about irrigation, they all testified that they made their own decisions for irrigating the property. All three lessees started irrigating as early as they could and continued irrigating as late as they could. None of these lessees limited their irrigation to the dates claimed by Robertson.

4. Evan Andrene leased the property from 1970 to 1983. He was not able to recall specific dates, only his general practices and general time frames. At the same time, his period of use was not date specific. Rather, it was dictated by the conditions each year. Andrene often began irrigating before the commissioner came on for that year and continue irrigating after the commissioner went off. He did not recall any limitation on when he irrigated other than “common sense.” Andrene tried to start irrigating when the snow was gone. (“April sometimes, May for sure”). He would clean the ditch every year, typically in early April. He started calving around March 1. Calving lasted about six weeks. When calving was done, he started irrigating. He preferred to start around

April 15 although his memory of his actual practices has faded. In the fall, Andrene irrigated into September but could not recall how often or how far into the month. He liked to irrigate in the fall to improve pasture and winter soil moisture for crops.

5. Earl Knighton followed Andrene as the lessee on the Robertson ranch. Since he leased the ranch from 1983 to 1993, his testimony did not provide evidence of historical use (pre-July 1, 1973). Nonetheless, the similarity to Andrene's testimony is worth noting. Knighton began calving in late February and took between 45 and 60 days. He cleaned the ditches after the ice was gone, typically after calving, and tried to start irrigating in April. He usually began irrigating before the water commissioner came on and continued to irrigate after the commissioner went off. He was never aware of any limit on his period of use. Knighton tried to irrigate through September or until the water gave out. As with Andrene, Knighton's testimony indicates that irrigation on this property was dictated by the conditions and was not date specific. The annual start and stop date varied from year to year.

6. Boyd Van Fleete told a similar story from his time leasing the Robertson property from 1997 to 1998. He usually began irrigating before the water commissioner came on and continued to irrigate after the commissioner went off. He was never aware of any limit on his period of use. Van Fleete tried to start irrigating in April and continue through September.

7. A lifelong cowboy, Lawrence Gibbs began working in this area in 1940. He purchased a place on South Meadow Creek in 1971. Gibbs worked for the McGee Ranch, just west of VGR, from 1961 to 1993. McGee Ranch shared a point of diversion and ditch with Robertson. Gibbs does not think the McGee Ranch ever irrigated before May 1. On cross examination he acknowledged that the McGee water rights (now Birch Creek Ranch) claim a period of use starting in April. (VGR-13) Gibbs knew Ermin and David Skank who were Andrene's predecessors as lessees on the Robinson place. Gibbs helped Skanks with branding on the Robertson property. This could have been in April depending on the year. He does not recall seeing irrigation during branding, but

acknowledged he spent his time where they were branding and does not recall seeing the main irrigation ditch. Gibbs' main point was that the land on VGR is too steep for early and late irrigation. Any attempt to do so would result in icing that is dangerous for livestock. He did not distinguish between irrigating in April and September as opposed to December and January. Gibbs claimed a year-round period of use on his property. He stated that he can irrigate in the winter when conditions are right because his property is flat and irrigation does not present a hazard to livestock. Gibbs acknowledged that irrigation practices in this area vary from ranch to ranch.

8. Information provided by VGR expert Deborah Stevenson shows that the various water users on South Meadow Creek claim a variety of periods of use. Most of these users claimed a period of use that started before VGR's period of use and ended after VGR's period of use. (VGR-11, p 6) This information is in line with testimony at hearing indicating that irrigation practices varied from ranch to ranch. It also indicates the irrigation season on this source started well before May 15 and continued past September 15.

9. Water commissioner records offer little evidence for period of use. The records show the commissioner seldom started before mid-May and usually finished by mid-September. (VGR-31) All witnesses who were asked the question stated that it was common to irrigate both before and after the commissioner was managing the creek. As a result, the testimony of irrigators is better evidence of historical use.

10. Irrigation practices on the Robinson Ranch (now VGR) followed seasonal patterns that varied from year to year. Irrigation started as early as possible in the spring and continued as late as possible in the fall. None of the lessees who testified ever limited their irrigation to specific dates. They did not adhere to dates claimed by James Robinson. A majority of the irrigators on South Meadow Creek claimed longer periods of use. Indicating, that the irrigation season on this source starts before May 1 and lasts after September 15. A preponderance of the evidence shows that the period of use claimed by James Robertson is not historically accurate.

Claims 41F 3482-00, 41F 3483-00, and 41F 3484-00

11. VGR is seeking an April 20 to October 14 period of diversion/use for claims 41F 3482-00, 41F 3483-00, and 41F 3484-00. A preponderance of the evidence supports the April 20 date. Historical practice was to begin irrigating after calving, subject to conditions and available flow. Calving started in late February or early March and lasted six weeks to two months. Irrigation started when calving ended. While VGR's predecessors may not have regularly started by April 20, the evidence indicates that it happened often enough to support that date as historically accurate.

12. Conversely, there was virtually no testimony supporting irrigation in October. Both Evan Andrene and Earl Knighton indicated that they irrigated into September as far as possible. Andrene stated the season ended in September. Knighton stated he tried to irrigate through September or until the water gave out. Both statements indicate, that the major factor in the fall is water availability and that October irrigation was not a significant factor. A preponderance of the evidence supports a September 30 end date.

Claims 41F 3485-00, 41F 3486-00, and 41F 3487-00

13. VGR is seeking an April 1 to June 15 period of diversion/use for claims 41F 3485-00, 41F 3486-00, and 41F 3487-00. All three claims have the same June 1, 1909 priority date. All three received an information remark identifying them as high or flood water rights from South Meadow Creek. This status implies they are the first rights cutoff by a commissioner as spring high flows begin to recede. It does not typically imply that they are diverted by themselves before the appropriator's more senior rights are diverted. The evidence at hearing did not distinguish between VGR's more senior rights and these highwater rights. None of the witnesses stated that they started irrigating earlier with certain rights. More importantly, there was no testimony indicating VGR's predecessors ever began irrigating by April 1. Therefore, the evidence does not support the April 1 start date VGR is proposing. A preponderance of the evidence does support the same April 20 start date discussed above.

14. VGR's proposed June 15 end date constitutes a significant reduction to the period of diversion/use for these claims. This reduction does not require supporting evidence. Therefore, a June 15 stop date is acceptable.

Conclusions of Law

1. A motion to amend an existing right is judged against the original statement of claim. Amendments are only appropriate where a preponderance of the evidence shows that the original claim is not an accurate reflection of historical use and the proposed amendments are necessary to accurately reflect that historical use. *Nelson v. Brooks*, 2014 MT 120, ¶34, 375 Mont. 86, 329 P.3d 558.

2. Amendments allow a claimant to correct an error in the original statement of claim filing. They do not allow a claimant to implement contemporary changes to the claim. Therefore, adverse affect is not a factor in a review of historical use. Amending a claim does not impose new burdens on other water users. Rather, the amendment reflects the same historical burden that has applied to other water users since the claim was first appropriated. Amending the claim does not change the impact the water right has on other water users.

3. VGR has met its burden of proof to show that the period of use and period of diversion that currently appear on these claims do not accurately reflect the historical beneficial use of these water rights. A preponderance of the evidence supports an April 20 to September 30 period of use and period of diversion for claims 41F 3482-00, 41F 3483-00, and 41F 3484-00, and an April 20 to June 15 period of use and period of diversion for claims 41F 3485-00, 41F 3486-00, and 41F 3487-00.

Order

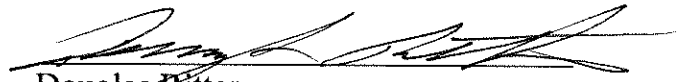
ORDERED that VGR's motion to amend the period of diversion and period of use for these claims is GRANTED as follows:

41F 3482-00	May 1 to September 15	<u>April 20 to September 30</u>
41F 3483-00	May 1 to September 15	<u>April 20 to September 30</u>

41F 3484-00	May 1 to September 15	<u>April 20 to September 30</u>
41F 3485-00	May 1 to September 15	<u>April 20 to June 15</u>
41F 3486-00	May 1 to September 15	<u>April 20 to June 15</u>
41F 3487-00	May 1 to September 15	<u>April 20 to June 15</u>

The attached water right claim abstracts confirm the amendments have been applied to the claims in the State's water right data base.

DATED this 16 day of November, 2016.


Douglas Ritter
Associate Water Judge

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