

Montana Water Court
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FILED

FEB 28 2017

Montana Water Court

MONTANA WATER COURT, YELLOWSTONE DIVISION
PRYOR CREEK - BASIN 43E

CLAIMANTS: Durene A. Bowman; W. Scott Green; Robert Roods
Jr.; Shawn R. Roods; Stephanie L. Roods; Sue R.
Roods

CASE 43E-141
43E 186719-00

OBJECTOR: Apsaalooke (Crow) Tribe; United States of America
(Bureau of Indian Affairs)

NOTICE OF FILING OF MASTER'S REPORT

You may file a written objection to the Report if you disagree with the Master's Findings of Fact, Conclusions of Law, or Recommendations; or if there are errors in the Report.

The above stamped date indicates the date the Master's Report was filed and mailed. Rule 23 of the Water Rights Adjudication Rules requires that written objections to a Master's Report must be filed within 10 days of the date of the Master's Report. Because the Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10 day objection period. Rule 6(d) M.R.Civ.P. This means your objection must be received no later than 13 days from the above stamped date.

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

The owners of claim 43E 186719-00 are: Durene A. Bowman, W. Scott Green, Robert Roods, Jr., Shawn R. Roods, Stephanie L. Roods, and Sue R. Roods. Claim 43E 186719-00 was decreed with the following DNRC issue remark:

NO REVIEW OR DETERMINATION OF THE CLAIMED TYPE OF HISTORICAL RIGHT HAS BEEN MADE. ADDITIONAL EVIDENCE MAY BE REQUIRED BEFORE THIS CLAIM CAN BE DECREED.

The Apsaalooke (Crow) Tribe of Indians and United States of America (Bureau of Indian Affairs) objected to all elements of claim 43E 186719-00. Florence M. Goggins and Patrick K. Goggins filed a Notice of Intent to Appear that was later withdrawn. Claim 43E 186719-00 was consolidated in to Case 43E-141.

FINDINGS OF FACT

1. Claim 43E 186719-00 was claimed as a reserved right with a May 7, 1869 priority date – the date of the Fort Laramie Treaty.

2. On June 15, 2016, the Objectors in Case 43E-141 filed their Conditional Withdrawal of Objections. The Conditional Withdrawal proposed that two sentences be added to claim 43E 186719-00, describing the claim as a Walton right:

THIS WATER RIGHT IS A WALTON RIGHT.

THIS WATER RIGHT IS NOT PART OF THE TRIBAL WATER RIGHT AS DEFINED IN THE CROW COMPACT.

Hereinafter, these claims will be referred to as the “Walton remarks.”

3. On June 20, 2016, an Order Setting Filing Deadline was issued. The Order set a deadline by which the Claimants were to agree or disagree with the Objectors’ proposal. The Order stated that if nothing if filed by the deadline, this Master would conclude that the Claimants agree with the Objectors’ proposal. The following language was also included:

Failure to comply with the terms of this Order may result in sanctions, up to and including entry of default and termination of a water right claim or dismissal of objections. Rule 22, W.R.Adj.R.

4. Claimants Robert Roods Jr., Shawn R. Roods, Stephanie L. Roods, and Sue R. Roods did not respond by the filing deadline and therefore indicated their agreement with the Objectors' proposal.

5. On July 18, 2016, W. Scott Green filed a Notice of Disagreement with the Objectors' Proposed Conditional Withdrawal of Objections on behalf of himself and his wife, Durene A. Bowman. In the filing, Mr. Green accused the Objectors of filing frivolous and retaliatory objections and concludes that the Objectors should not be permitted to withdraw their Objections without paying Ms. Bowman and Mr. Green's expenses including the cost of obtaining an abstract as well as attorney's fees presumably charged by Mr. Green to himself and Mrs. Bowman.

6. As the conditions set in the Withdrawal had not been agreed upon, the Objections were still outstanding as to Mr. Green and Ms. Bowman's portion of claim 43E 186719-00. A Scheduling Order was issued on July 20, 2016.

7. On August 11, 2016, Ms. Bowman and Mr. Green filed their Status Report to the Court. The Status Report did not report to the Court the status of settlement as required by the Scheduling Order.

8. On August 15, 2016, the Objectors filed their Response to Claimants' Status Report to the Court. The Response recounted an August 11, 2016 conference between the parties and also argued that the Claimants' Status Report was flawed. The Objectors requested that the Court set a briefing schedule to address (1) whether the Objectors are obligated to reimburse Mr. Green and Ms. Bowman for the cost of the title report and attorney's fees and (2) whether it is appropriate to add the Walton remarks to claim 43E 186719-00, as agreed upon by the other parties in this Case.

9. The Scheduling Order was vacated and a Briefing Schedule was issued regarding the issue of whether it is appropriate to add the two above-listed sentences to claim 43E 186719-00. The Scheduling Order did not require the parties to brief the issue of costs and attorney's fees as it was still unclear who the prevailing party in this Case would be.

10. On September 23, 2016, Mr. Green filed his Brief in Support of the Court Entering a Final Decree Without Additional Language Added to the Preliminary Decree.

In this filing, Mr. Green confirmed: that claim 43E 186719-00 is located within the boundaries of the Crow Indian Reservation; the place of use became part of the Reservation on May 7, 1868; the place of use was allotted to a member of the Crow Tribe on December 2, 1907; the property was taken out of trust and sold to a non-Indian purchaser on July 22, 1920; and the water right is subject to the Crow-Tribe Montana Compact, section 85-20-901, MCA and is a non-tribal water right recognized under state law pursuant of Article II, ¶ 19 of the Compact.

Mr. Green argued that the Crow Tribe and the BIA have the burden of proving that failure to add the Walton remarks will cause confusion as to the extent of the disputed water right.

Mr. Green contended that addition of the Walton remarks is “nothing but superfluity” and adding the Walton remarks would add nothing and would taint claim 43E 186719-00. Mr. Green continued, “If the Court is inclined to insist on the remarks, Claimants request an evidentiary hearing to present evidence as to how such remark adversely affects their rights.”

11. On October 11, 2016, the Objectors filed their Response to Claimants’ Notice of Disagreement, Status Report and Opening Brief. The October 11, 2016 filing explains that Mr. Green’s assertions are without merit contending: Mr. Green wants a reserved water right without having reserved water from the public domain; claim 43E 186719-00 is a privately held water right that derives from a federal reservation of water; privately held water rights derived from the public domain are limited and are different than federally held water rights withdrawn from the public domain; and not adding the Walton remarks would result in confusion.

12. On October 28, 2016, Mr. Green filed a Reply Brief. The Reply Brief maintains that the Walton remarks are unnecessary and that “the Objectors’ position taken on this water right claim are nothing but a ruse to disguise their previous frivolous objections to the claim.”

13. A Status Conference was conducted on November 16, 2016. The parties determined a Scheduling Order should be issued. The parties disagreed about which party bears the burden of proving that claim 43E 186719-00 will not be adversely

affected by the addition of the Walton remarks. A briefing schedule was issued at the request of Mr. Green. Briefing regarding the party bearing the burden of proof followed.

The briefing confirmed that both parties agree that claim 43E 186719-00 is a Walton right; the only disagreement is whether the Walton remarks should be added to the claim. The briefing also confirmed that there are no evidentiary or factual issues to be decided as the parties agree to the historical elements of the claim.

CONCLUSIONS OF LAW

1. The Water Court's jurisdiction is limited to determining the validity and elements of existing water rights. Memorandum and Order, Case 40G-A, April 16, 1991 citing Section 3-7-501 MCA.

2. Consistent with Chief Water Judge Russ McElyea's Order Rejecting Master's Report, Order Approving Stipulation, and Order Closing Case in Case 43O-8, filed on January 15, 2015, and modified by the July 15, 2015 Order Amending and Adopting Master's Report in Case 43N-4, claim 43E 186719-00 should remain a "Reserved" right and the Walton remarks should be added to the claim.

3. Information remarks "limit, define, or explain unique aspects of a claim." Rule 2(a)(57), W.R.C.E.R. Information remarks may be added to a claim abstract by the Water Court in order to clarify or define the right. *Id.* Here, the addition of the Walton remarks is both necessary to explain a unique aspect of the claim and is consistent with previous decisions by Chief Water Judge Russ McElyea.

4. Mr. Green has requested sanctions against the Objectors. On July 18, 2016, Mr. Green filed the Claimants' Notice of Disagreement with Objectors' Proposed Conditional Withdrawal of Objections. Mr. Green stated:

In order for the Objectors to withdraw their objections at this time, they should be required to pay Claimants' cost of obtaining the abstract in the amount of \$737.90, and Claimants' attorney's fees incurred in opposing this objection.

Mr. Green cited Rule 41(a)(2), of the Montana Rules of Civil Procedure.

In his final brief in these proceedings, Mr. Green states that the Court should enter Rule 11 sanctions against the Objectors "because they have objected to each and every element of the Claimants' water right, and refused to acknowledge the established water right priority date of May 7, 1868..."

Pursuant to section 85-2-233, all interested water users may file objections to claims in order to protect their own interest. There is nothing unusual or inappropriate about the objections filed in this Case. Sanctions are not appropriate.

5. Pursuant to Rule 22, W.R.Adj.R., if a claimant, objector, or intervenor fails to appear at a scheduled conference or hearing, or fails to comply with an order issued by the Water Court, the Water Court may issue such orders of sanction with regard thereto as are just.

6. As there are no evidentiary or factual issues to be decided in this Case because the parties agree to the historical elements of the claim, a hearing is not appropriate.

RECOMMENDATIONS

1. The Walton remarks should be added to claim 43E 186719-00.
2. The issue remark should be stricken from claim 43E 186719-00.
3. The Objections to claim 43E 186719-00 should be dismissed.
4. No sanctions, including costs and attorney's fees, should be ordered in this Case.

A Post Decree Abstract of Water Right Claim is served with the Report to confirm that the recommended changes have been made in the state's centralized record system.

DATED this 28 day of FEBRUARY, 2017.



Anika M. Stern
Senior Water Master

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(406) 671-0608

Potential Owner:
Lyndon S. Coburn
1524 S 56th St W
Billings, MT 59106-2834

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM**

PRYOR CREEK

BASIN 43E

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: 43E 186719-00 RESERVED CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners:

DURENE A BOWMAN
10 W 3RD ST
HARDIN, MT 59034

STEPHANIE L ROODS
7420 HWY 87 E
BILLINGS, MT 59101

W SCOTT GREEN
PATTEN PETERMAN BEKKEDAHL & GREEN PLLC
2817 2ND AVE N STE 300
BILLINGS, MT 59101

ROBERT ROODS JR
6512 PRYOR
BILLINGS, MT 59101

SUE R ROODS
6512 PRYOR
BILLINGS, MT 59101

SHAWN R ROODS
7420 HWY 87 E
BILLINGS, MT 59101

Priority Date: MAY 7, 1868

Type of Historical Right: RESERVED

THIS WATER RIGHT IS A WALTON RIGHT.

THIS WATER RIGHT IS NOT PART OF THE TRIBAL WATER RIGHT AS DEFINED IN THE CROW COMPACT.

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

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: PRYOR CREEK, EAST FORK
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		E2NE	31	1S	28E	YELLOWSTONE

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

2		W2NW	32	1S	28E	YELLOWSTONE
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Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

3		N2SW	32	1S	28E	YELLOWSTONE
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Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

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>Twp</u>	<u>Rge</u>	<u>County</u>
1			E2NE	31	1S	28E	YELLOWSTONE
2			W2NW	32	1S	28E	YELLOWSTONE
3			N2SW	32	1S	28E	YELLOWSTONE

Remarks:

THIS WATER RIGHT IS LOCATED, IN WHOLE OR IN PART, WITHIN THE BOUNDARY OF THE CROW INDIAN RESERVATION.