

Montana Water Court  
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FILED

NOV 28 2017

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
MARIAS RIVER - BASIN 41P

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CLAIMANT: Lazy K-6 Ranch, Inc.

CASE 41P-7  
41P 157486-00  
41P 157500-00  
41P 157501-00  
41P 157505-00  
41P 157516-00  
41P 157518-00  
41P 157520-00  
41P 157523-00

**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 that the Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules requires that written objections to a Master's Report must be filed within ten (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 three (3) days to be added to the ten-day objection period. Rule 6(d), M. R. Civ. P. This means that your objection must be received no later than thirteen (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**  
**PROCEDURAL HISTORY**

These claims are stock claims and an irrigation claim in the Marias River (Basin 41P). Statements of Claim were timely filed. The claims underwent the pre-decree examination process by the Department of Natural Resources and Conservation (DNRC) and received issue remarks. No Objections or Notices of Intent to Appear (NOIA) were filed.

**FINDINGS OF FACT**

1. On February 17, 2017, the Court issued an Order Consolidating and Order Setting Deadlines Pursuant to Section 85-2-248(5), MCA, which ordered Claimant to pursue issue remark resolution with the DNRC.

2. On June 19, 2017, the DNRC filed a Memorandum that recommends the resolution of various issue remarks, with two attached Verified Motions to Amend Water Right Claim and four Requests to Withdraw Statement of Claim.

3. Claim 41P 157486-00 was decreed with the following issue remark:

A FORM GW4, DECLARATION OF VESTED GROUNDWATER RIGHTS, WAS FILED AND SUBMITTED WITH THIS CLAIM AS A GW2, NOTICE OF COMPLETION OF GROUNDWATER APPROPRIATION.

4. The 1961 Groundwater Code, § 89-2911 *et seq.*, RCM (1961), established a mandatory filing system for all groundwater appropriations made after January 1, 1962.

5. The Declaration of Vested Groundwater Rights (form GW4) was created to allow those who had appropriated groundwater prior to January 1, 1962, to file for their rights. The statutes allowed pre-January 1, 1962, groundwater appropriators to file Declarations (form GW4) with the appropriate county's Clerk and Recorder until December 31, 1965. Section 89-2913(h), RCM (1965). In 1971, the Legislature clarified that the Declaration (form GW4) expired on January 1, 1966. *Id.*

6. To file for a post-January 1, 1962, appropriation, a groundwater appropriator was required to file a notice of appropriation and a Notice of Completion (form GW2) with the appropriate county's Clerk and Recorder, to protect the date of appropriation. Sections 89-2912, -2913, RCM. The failure to file a notice of appropriation deprived the appropriator from the right to relate his Priority Date back to the date of appropriation. Instead, the Priority Date became the date the Notice of Completion was filed. Section 89-2913, RCM. The failure to file a Notice of Completion deprived the appropriator of a valid right at all. Section 89-2913(e), RCM. In 1979, the Legislature provided a mechanism for relief for post-January 1, 1962, groundwater appropriators who failed to file Notices of Completion, and allowed appropriators to file Statements of Claim, and the Priority Date would then be the date of the filing of the Statement of Claim. Section 85-2-306, MCA.

7. The Declaration of Vested Groundwater Rights (form GW4) and the Notice of Completion (form GW2) require very much of the same information. The only notable difference is that the Declaration does not require details about the drilling of the well (such as the driller's name, address, and license; surface elevation at the well head; and drilling log that shows the character and thickness of penetrated formations). This is because a Declaration (form GW4) was intended to be submitted for appropriations that had occurred in the past, and well drilling information may have not been available at the time the form was filed with the county.

8. The claimed Priority Date for Claim 41P 157486-00 is June 28, 1973.

9. There is no valuable reason a post-January 1, 1962, groundwater appropriator would file a Declaration (form GW4) with a county in 1973. The reasonable conclusion for the filing of a post-January 1, 1962, Declaration is that the appropriator mistook form GW4 for form GW2.

10. As the missing information on form GW4 does not relate to any element of a valid water right claim, substance over form should be applied in this case, and the form GW4 accepted in lieu of the proper form GW2. The filing of the incorrect form GW4

with the county's Clerk and Recorder sufficiently notified water users of the completion of a groundwater appropriation, and the issue remark can be removed from the claim.

11. Claimant has requested to withdraw the following claims: Claims 41P 157500-00, 41P 157501-00, 41P 157050-00, and 41P 157516-00. The Memorandum recommends acceptance of the withdrawals to resolve the issue remarks placed on the claims.

12. Claim 41P 157518-00 was decreed with the following issue remark:

THE TYPE OF HISTORICAL RIGHT MAY BE QUESTIONABLE. DOCUMENTATION SUBMITTED WITH THE CLAIM INDICATES A USE RIGHT.

13. Claimant has requested to change the Type of Historical Right from filed to use. The Memorandum recommends acceptance of the change to resolve the issue remark placed on the claim.

14. Claim 41P 157520-00 was decreed with the following issue remark:

THE CLAIMED PRIORITY DATE MAY BE QUESTIONABLE. IT APPEARS THE PRIORITY DATE SHOULD BE THE DATE THE RESERVOIR WAS FIRST PUT TO USE.

15. The reservoir used for this claim appears on an aerial photograph dated in 1956. The claimed Priority Date is December 18, 1959. The Memorandum states that during a phone conversation with Claimant, Claimant confirmed the 1959 Priority Date. Therefore, the issue remark is resolved and can be removed without further change to the elements of the claim.

16. Claim 41P 157523-00 was decreed with the following issue remarks:

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

THE MAXIMUM ACRES CLAIMED MAY BE QUESTIONABLE. THE SUM OF THE PARCEL ACRES IS 70.39.

THE CHOUTEAU COUNTY WATER RESOURCES SURVEY (1964) APPEARS TO INDICATE 67.00 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

USDA AERIAL PHOTOGRAPH NO(S). 278-165, DATED 07/21/1979, APPEARS TO INDICATE 59.00 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

THE CLAIMED PRIORITY DATE MAY BE QUESTIONABLE. THE PRIORITY DATE ON THE SUBMITTED NOTICE OF APPROPRIATION IS 04/10/1946.

17. Claimant requests to change Claim 41P 157523-00 as follows:

**Priority Date:** ~~AUGUST 19, 1957~~      **MARCH 10, 1946**  
**Flow Rate:**      ~~3.79 CFS~~      **2.84 CFS**  
**Maximum Acres:**      ~~100.00~~      **75.00**

**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	<del>5.00</del> <u>4.00</u>	<del></del> <u>6</u>	<del>SWSWNE</del> <u>SENE</u>	<del>24</del>	<del>26N</del>	<del>8E</del>	<del>CHOUTEAU</del>
2	<del>5.00</del> <u>7.00</u>	<del></del> <u>4</u>	<del>SENE</del> <u>SENE</u>	<del>19</del>	<del>26N</del>	<del>9E</del>	<del>CHOUTEAU</del>
3	<del>80.00</del> <u>47.00</u>		<del>W2SE</del>	<del>19</del>	<del>26N</del>	<del>9E</del>	<del>CHOUTEAU</del>
4	<del>10.00</del> <u>3.00</u>		<del>NENESW</del>	<del>19</del>	<del>26N</del>	<del>9E</del>	<del>CHOUTEAU</del>
<u>5</u>	<u>6.00</u>	<u>3</u>	<u>SWNW</u>	<u>19</u>	<u>26N</u>	<u>9E</u>	<u>CHOUTEAU</u>
<u>6</u>	<u>8.00</u>	<u>5</u>	<u>SWNE</u>	<u>19</u>	<u>26N</u>	<u>9E</u>	<u>CHOUTEAU</u>
<b>Total:</b>	<del>100.00</del> <u><b>75.00</b></u>						

18. The Memorandum states that the map submitted with the Statement of Claim for Claim 41P 157523-00 is not very clear. During claims examination, the DNRC did not include the Place of Use in Section 24 as an examined area, likely because there is no irrigation shown in the SWNE. However, irrigation is present in the SENE. The Memorandum concludes that the legal land description was likely mistakenly written on the Statement of Claim. With the inclusion of irrigation in the SENE of Section 24, the Memorandum states that 75.00 acres are verified. The reduction in Flow Rate is in line with the DNRC's 17 gallons per minute per acre standard for irrigation claims. The Memorandum recommends acceptance of Claimant's proposed changes to resolve the issue remarks placed on the claim.

19. Claimant incorrectly identified March 10, 1946, as the date of the Notice of Appropriation. Therefore, the correct date of the Notice should be used, April, 10, 1946, as the Priority Date for Claim 41P 157523-00.

## PRINCIPLES OF LAW

1. The Montana Water Court has the authority to determine the extent of all water rights in the state as they existed prior to July 1, 1973. *Fellows v. Saylor*, 2016 MT 45, ¶ 25, 382 Mont. 298, 367 P.3d 732; §§ 85-2-233; -102(12), MCA.

2. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA.

3. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

4. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

5. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

6. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

7. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA.

8. If a claimant agrees to reduce or limit a claim, the Water Court may accept the reduction or limitation without reviewing further evidence, unless an unresolved issue remark remains. Rule 17(c), W.R.Adj.R.

9. When reviewing a document substance over form is emphasized. *In re Charles M. Bair Family Trust*, 2008 MT 144, ¶ 32, 343 Mont. 138, 183 P.3d 61.

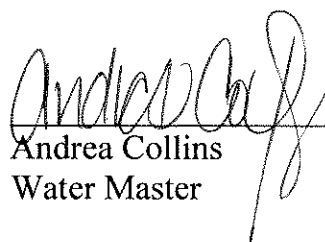
## CONCLUSIONS OF LAW

1. The evidence in the record is sufficient to resolve the issue remarks placed on the above-captioned claims.

## RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above in the Findings of Fact. This Master further recommends that the Court dismiss Claims 41P 157500-00, 41P 157501-00, 41P 157050-00, and 41P 157516-00. Post-Decree Abstracts of the Water Right Claims are served with this Report to confirm the changes in the centralized record system.

DATED this *28* day of *November*, 2017.

  
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Andrea Collins  
Water Master

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