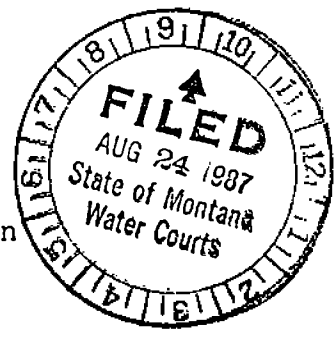


IN THE WATER COURTS OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
KOOTENAI RIVER BASIN (76D)

\* \* \* \* \*

IN THE MATTER OF THE ADJUDICATION )  
OF THE EXISTING RIGHTS TO THE USE ) CASE NO. 76D-79  
OF ALL THE WATER, BOTH SURFACE AND )  
UNDERGROUND, WITHIN THE KOOTENAI ) Claim 76D-W-100479-00  
RIVER DRAINAGE INCLUDING ALL )  
TRIBUTARIES OF THE KOOTENAI RIVER IN )  
FLATHEAD AND LINCOLN COUNTIES, )  
MONTANA. )

CLAIMANT: City of Troy  
OBJECTOR: Mt. Dept. of Natural Resources & Conservation



MASTER'S REPORT

Pursuant to Title 85, Chapter 2, MCA 1979, this case was submitted on briefs to the Water Master Linda Hickman.

STATEMENT OF THE CASE

Claim 76D-W-100479-00 was filed by the City of Troy for municipal water. The flow rate claimed by the City was 18 cubic feet per second. The volume claimed was 13,140 acre feet per year. The claim was based on a filed notice of appropriation dated October 27, 1923.

The volume and flow rate for claim 76D-W-100479-00 were objected to by the Department of Natural Resources & Conservation. The basis for the objection was that the City of Troy does not use the amount of water claimed nor does it's distribution system have the capacity to carry that amount of water.

The Department sent two sets of interrogatories to the City of Troy, which were answered. Based on the interrogatories and answers, an engineer with the Department came to the conclusion that "the City should claim a volume of 365 acre feet per year for municipal use. The maximum flow rate should equal 4.5 cubic feet per second based on the hydraulic capacity of the system."

The Department states the issue to be decided as: "The real issue in this case is not the present needs of the City of Troy, rather it is the claimed right by the City of Troy to water which it has not historically used and put to beneficial use."

The City states the issue as: "The primary issue is not whether the City of Troy is currently putting to actual use the decreed amount of 18 cfs, but rather whether the 18 cfs claimed by the City of Troy is within the historical definition of beneficial use as applied under the Montana Water Law pursuant to July 1, 1973."

The Department's argument is that the rule stated in Galahan vs. Lewis, 105 Mt. 294, 72 P.2d 1018 (1937) should be controlling here as well. The rule is: "...in determining a water right the appropriator's needs and facilities, if equal, measure the extent of the appropriation, but if needs exceed the capacity of the means of diversion, the capacity of the means of diversion measures the extent of the water right." The Department lists several ways for the City to be assured of needed water in the future above its present system's capacity.

The City's argument is that because it has a duty under Montana law to secure and promote the general public health and welfare; furnish reasonable and adequate services and facilities; and supply water to all those within the boundaries of the municipality, together with any adjacent to water lines extending beyond the city limits, it should be granted water in excess of its facilities capacity.

The City itself asserts that part of its water right claim is related to the City's potential for development and consequential demand for increased water.

#### FINDINGS OF FACT

##### I.

Claim 76D-W-100479-00 was filed by the City of Troy for municipal water.

##### II.

The volume and flow rate were objected to by the Department of Natural Resources & Conservation.

##### III.

The parties agree that the City of Troy now puts to beneficial use a flow rate of about 2 cubic feet per second of water and a volume of 365 acre feet per year.

##### IV.

The capacity of the City of Troy's water system is 4.5 cubic feet per second.

#### CONCLUSIONS OF LAW

##### I.

The Water Court has jurisdiction to review all

objections to temporary preliminary decrees pursuant to 85-2-233, Montana Code Annotated.

II.

The Water Court has jurisdiction to make clerical corrections pursuant to Water Court Rule 4.

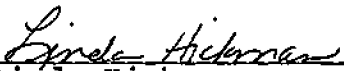
III.

In determining the amount of an appropriation of water, the appropriator's needs and his facilities for conveying the water to the place of its use, if equal, measure the extent of his appropriation; if his needs exceed the capacity of his ditch then its capacity measures the extent of his right. Galahan et al. v. Lewis, et al, 105 Mt. 294, 297, 72 P.2d 1018 (1937).

IV.

The flow rate for 76D-W-100479-00 shall be 2 cubic feet per second. The volume shall be 365 acre feet per year.

DATED this *20th* day of *August*, 1987.

  
\_\_\_\_\_  
Linda Hickman  
Water Master

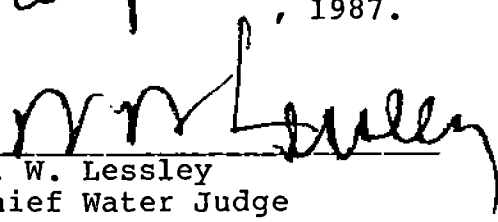
O R D E R

After review of the Master's Report, it is ORDERED, that the following changes be made to the Preliminary Decree of Existing Water Rights in the Kootenai River Basin.

I.

The flow rate for 76D-W-100479-00 is 2 cubic feet per second. The volume is 365 acre feet per year.

DATED this 20 day of Aug, 1987.

  
W. W. Lessley  
Chief Water Judge

Tim D. Hall, Attorney  
Dept. of Natural Resources  
1520 East Sixth  
Helena, MT 59620

Mark Fennessy  
Attorney at Law  
505 Mineral Avenue  
Libby, MT 59923

MEMORANDUM

The Montana Water Court was charged to adjudicate all water rights which were in existence before July 1, 1973. The final decrees of the Court are to reflect the manner in which those rights were being used prior to July 1, 1973. An "existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973. 85-2-102(7) MCA.

Because of this legislative mandate the Court had to apply pre-1973 law in determining the amount of water that was to be granted to the City of Troy. In no way does the Court's decision reflect either what has happened in Troy since July 1, 1973, nor what may occur in Troy in the future. There are alternative methods of insuring an adequate future water supply open to the City of Troy.

  
Water Master

BASIN 76D  
ABSTRACT OF WATER RIGHT

WATER RIGHT NUMBER 76D -W-100479-00

OWNERS: TROY, CITY OF  
DRAWER S  
TROY MT 59935

PRIORITY DATE: OCT 27, 1923

FLOW RATE: 2.00 CFS

VOLUME: 365.00 ACRE FEET PER YEAR

SOURCE: OBRIEN CREEK

PURPOSE (USE): MUNICIPAL

PERIOD OF USE: JAN 1 TO DEC 31

POINTS OF DIVERSION AND MEANS OF DIVERSION:

<u>LOT</u>	<u>BLK</u>	<u>QTR</u>	<u>SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	
			NENENW	17	31N	34W	LINCOLN	HEADGATE
RESERVOIR AT			NENENW	17	31N	34W	NAME: TROY CITY	

PLACE OF USE FOR MUNICIPAL

<u>ACRES</u>	<u>LOT</u>	<u>BLK</u>	<u>QTR</u>	<u>SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
001					12	31N	34W	LINCOLN
002					13	31N	34W	LINCOLN
003					W2 18	31N	34W	LINCOLN

REMARKS: SEE GENERAL FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR FURTHER DELINEATION OF THIS RIGHT.

IN THE WATER COURTS OF THE STATE OF MONTANA  
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IN THE MATTER OF THE ADJUDICATION )  
OF THE EXISTING RIGHTS TO THE USE )  
OF ALL THE WATER, BOTH SURFACE AND )  
UNDERGROUND, WITHIN THE KOOTENAI )  
RIVER DRAINAGE AREA, INCLUDING ALL )  
TRIBUTARIES OF THE KOOTENAI RIVER )  
IN FLATHEAD AND LINCOLN COUNTIES, )  
MONTANA. )

CASE NO. 76D-79

JAN 24 1985  
4:37 pm

PREHEARING CONFERENCE STATEMENT OF CITY OF TROY

Pursuant to Order of the Water Master in Case No. 76D-79, Claimant, CITY OF TROY submits to the Court and parties in interest the following prehearing conference statement:

WITNESSES

1. Roger Kensler -- Mayor, November, 1983, through January, 1986.
2. James Winslow -- Mayor, May, 1956, through April 30, 1963.
3. Melvin Price -- Maintenance Foreman.

The testimony of the witnesses enumerated above will be offered to establish the quantity of water historically applied to beneficial use by the Claimant as well as the flow rates historically used and needed to supply the water system for the City of Troy, Montana.

The City of Troy reserves the right to add additional witnesses to this list after further preparation for hearing or discovery and upon proper notice to all parties.



EXHIBITS

1. Notice of Appropriation by M. F. Gossweiller, dated October 27, 1923, recorded at Book 25, Page 364, records of Lincoln County, Montana.

All of the exhibits enumerated above will be offered to establish the quantity of water historically applied to beneficial use by the Claimant as well as the flow rates historically used and needed to supply the water system for the City of Troy, Montana.

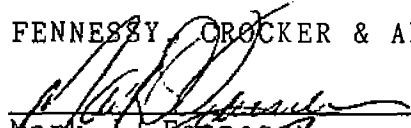
The City of Troy reserves the right to add additional exhibits to this list after further preparation for hearing or discovery and upon proper notice to all parties.

MEMORANDUM

The City of Troy will prove the quantity of water which it has historically applied to beneficial uses pursuant to the appropriation and claim which is subject hereof as well as flow rates it has historically used and requires to supply the municipal water system of Troy, Montana. Unknown expert witnesses will be provided, if necessary, to prove the volume and flow rate for the water system.

DATED this 17th day of January, 1985.

FENNESSY, CROCKER & ALLEN

  
\_\_\_\_\_  
Mark J. Fennessy  
Attorneys For City of Troy  
505 Mineral Avenue  
Libby, Montana 59923

