

IN THE WATER COURTS OF THE STATE OF MONTANA
CLARK FORK DIVISION - FLINT CREEK BASIN (76GS)

IN THE MATTER OF THE ADJUDICATION OF)
THE EXISTING RIGHTS TO THE USE OF ALL) 76E-W-119723-00
THE WATER, BOTH SURFACE AND UNDERGROUND,))
WITHIN THE FLINT CREEK DRAINAGE AREA))
INCLUDING ALL TRIBUTARIES OF THE FLINT))
CREEK IN GRANITE AND DEER LODGE))
COUNTIES, MONTANA.))
_____)

CLAIMANT: Montana Department of Natural Resources & Conservation

OBJECTOR: Montana Department of Natural Resources & Conservation

MASTER'S REPORT

FINDINGS OF FACT

1. This claim is an interbasin transfer between the Rock Creek Basin (76E) and the Flint Creek Basin (76GJ). The point of diversion is in Basin 76E and the place of use is in Basin 76GJ.

2. The Montana Department of Natural Resources and Conservation (Department) objected to the priority date, purpose of right, place of use and acres irrigated of its storage claim and to the "no right" remark.

3. At the February 10, 1989 Status Conference, attorney Richard Josephson made an oral motion to add the Flint Creek Water User's Association, as a real party in interest, to all further proceedings. Sarah Bond, attorney for the Department, agreed stating that the Association's interest is by

virtue of its contract to use the water, that the Association was not the owner of this right and that, as such, the parties are not adverse. The motion was granted.

4. On December 22, 1989 the Department filed its East Fork Rock Creek Reservoir Water Storage Brief and the Affidavit of Melvin F. McBeath, hydrographer for the Department. These were served upon the Flint Creek Water User's Association, Esther J. McDonald and their counsel, R. Mark Josephson on December 21, 1989. No response was filed.

5. The Temporary Preliminary Decree states that the purpose of right is irrigation.

6. The purpose of right should be storage.

7. The place of use caption should be changed from "Place of Use for Irrigation" to "Place of Use for Storage."

8. This is an onstream reservoir. Onstream reservoirs are quantified by volume. A flow rate is not required.

9. The Temporary Preliminary Decree did not quantify the volume of this claim.

10. The volume should be 13,800.00 acre feet.

11. The following remark should be added concerning the flow rate:

NO FLOW RATE HAS BEEN DECREED FOR THIS ONSTREAM RESERVOIR

12. As this is a valid claim for storage, the following remark should be removed from the abstract of this claim:

THE WATER COURT FINDS NO LEGAL BASIS FOR THIS PURPOSE TO BE CONSIDERED A BENEFICIAL USE OR APPROPRIATION OF WATER.

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.

The Flint Creek Water User's Association and its president Edward Lord were allowed to participate in all future proceedings involving the Department's objection.

III.

Upon review of the Affidavit, it appears that it is proper and is accepted by this Court.

IV.

89-101 R.C.M. (1933) directs the state water conservation board to develop "...a system of works, in the manner hereinafter provided, for the conservation, development, storage, distribution and utilization of water."

89-121 R.C.M. (1933) states that "...the board shall not be limited to the terms of the statutes of the State of Montana relating to water rights heretofore enacted; but, in addition thereto, may initiate a right to the waters of this state by executing a declaration in writing of the intention to store, divert or control the unappropriated waters of a particular body, stream or source..." (emphasis added).

This claim for water of the East Fork Rock Creek Reservoir is for storage water appropriated by the State Water Conservation Board under these statutes.

V.

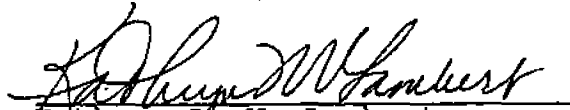
This is an onstream reservoir. Onstream reservoirs are quantified by volume. A flow rate is not required.

Sec. 85-2-234(6)(b)(ii) Mont. Code. Ann.

VI.

The changes stated in the Findings of Fact should be made to correct the Temporary Preliminary Decree in the Flint Creek Basin.

DATED this 9 day of May, 1990.


Kathryn L. W. Lambert
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.

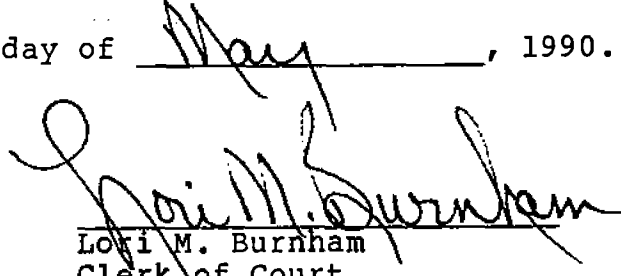
Sarah Bond, Attorney
Dept. of Natural Resources
1520 East Sixth
Helena, MT 59620

Flint Creek Water Users' Association
Ed Lord, President
Philipsburg, MT 59858

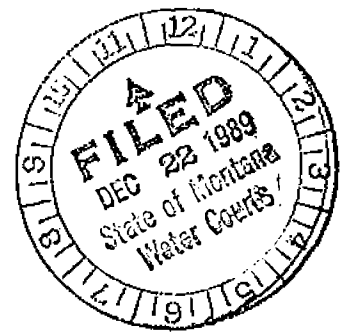
Esther J. McDonald
Drawer A
Philipsburg, MT 59858

R. Mark Josephson
Attorney at Law
P. O. Box 1047
Big Timber, MT 59011

DATED this 9th day of May, 1990.


Lori M. Burnham
Clerk of Court
Montana Water Court

Sarah Bond
 Legal Counsel
 1520 East 6th Ave.
 Helena, MT. 59620
 Telephone: (406) 444-6699
 COUNSEL FOR THE DEPARTMENT OF NATURAL
 RESOURCES AND CONSERVATION



IN THE WATER COURTS OF THE STATE OF MONTANA
 CLARK FORK DIVISION
 FLINT CREEK (76 GJ)

* * * * *

IN THE MATTER OF THE ADJUDICATION OF)	
THE EXISTING RIGHTS TO THE USE OF ALL)	EAST FORK ROCK
THE WATER, BOTH SURFACE AND UNDERGROUND,)	CREEK RESERVOIR WATER
WITHIN THE FLINT CREEK DRAINAGE AREA,)	STORAGE BRIEF
INCLUDING ALL TRIBUTARIES OF FLINT)	
CREEK IN GRANITE AND DEER LODGE)	WATER RIGHTS CLAIM
COUNTIES, MONTANA)	NO. 76GJ-W-119723
)	

* * * * *

Comes now the Montana Department of Natural Resources and Conservation (Department) as claimant, and respectfully submits this authority for its storage claims in the East Fork Reservoir. As the Department has no brief or objector's articulated argument to rebut, it is uncertain the quantum of proof the Water Court seeks before it will decree the right as claimed. Therefore, to the extent the Court deems necessary for decree of this right as indicated in the attached affidavit, the Department respectfully reserves its right to supplement this information with further hydrologic and historic information, as well as legal argument.

The Department is the successor in interest agency to the State Water Conservation Board, through the Water Resources Board. In the extraordinary session of the 1933, the Montana Legislature adopted Chapter 35, later codified as 89-101 through 89-141 R.C.M. 1947. See, generally, State ex. rel. Normile v. Cooney, 100 Mont. 391 (1935). "It is hereby declared that the public interest, welfare, convenience and necessity require the construction of a system of works, in the manner hereinafter provided, for the conservation, development, storage, distribution and utilization of water." 89-101 R.C.M (1947). These statutes delegated to the Board, as an arm of the state, the authority to build, operate, manage, and maintain a state-wide system of water conservation projects. Broadwater-Missouri Water Users' v. Montana Power Company, 139 F.2d. 998 (1944), 50 F.Supp. 4 (1942). The statutory framework included broad authority to construct works, purchase and dispose of property, provide for the issuance of revenue bonds, and appropriate water.

TC

This system, an integral part of Montana's agricultural infrastructure and economy today, includes the trans-basin diversion of water diverted, collected and impounded in East Fork Rock Creek Reservoir, and transported by a gravity feed conveyance system to the Flint Creek drainage to the West. There, it is used for irrigation, and other beneficial uses.

Within the statutory scheme first created in 1934 are sections establishing certain parameters of the rights created therein for perfection only by the State. These parameters reflect the legislature's conviction that the historic types of water rights already recognized in the state were insufficiently broad to fuel the new system.

" In acquiring the rights and administering the terms of this act herein prescribed and established, the board shall not be limited to the terms of the statutes of the state of Montana relating to water rights heretofore enacted; but, in addition thereto, may initiate a right to the waters of this state by executing a declaration in writing of the intention to store, divert or control the unappropriated waters of a particular body, stream or source, designating and describing in general terms such matters claimed, means of appropriation and location of use, and cause said notice to be filed in the office of the county clerk and recorder of the county where the major portion of the means of diversion or control will be located, which right shall vest in such board on the date of the filing of such declaration....

A certified copy of the record of said declaration shall be received as competent evidence in all courts and deemed to be prima facie proof of all matters therein recited...." Section 89-121 R.C.M. (1947).


The nature of a storage right in Montana has been the subject of much debate. Donich v. Johnson, 77 Mont. 229, 250 Pac.963 (1926), Federal Land Bank v. Morris, 112 Mont. 445, 199 P.2d.1007 (1941), Broadwater-Missouri Water Users' Assoc., supra. Whether the one fill rule is the limit of the right need not here be decided, as the volume of the East Fork Rock Creek Reservoir is greater than the right asserted. That the state water conservation project rights are valid pursuant to the terms of the notices, including the right to appropriate and reclaim seepage, is without cavil. Allendale Irrigation Co. v. State Water Conservation Board, 113 Mont. 436, 127 P.2d. 227 (1942), Holmstrom Land Co, Inc. v. Meagher County Newlan Creek Water District and Ward Paper Box, ___ Mont. ___, 605 P.2d. 1060 (1979). Given the facts herein, there is no new question of law to decide. The storage right sought is less than the appurtenant water use from the project, less than one filling, and reflects the historic operation of the reservoir and lack of interference with other rights.

The Department has enclosed an affidavit from a Departmental expert with personal knowledge of the historic use of this right. Attached is a copy of a reference normally used by those engaged in the business of hydrology and water supply and recognized by experts as authoritative for water supply statistics. The Department does not seek herein to advance a description of a water right other than that supported by historic use.

Whether storage pursuant to Sections 89-101-141 R.C.M. (1947) without appurtenant use for any particular period of time is not before the Court. The use of water from this Project has already been decreed in the basin of origin, water right number 76E-W-119732. Here, the Department only seeks the decree recognition of its right to store water in the Reservoir, as it has historically done, in wet years, for carry-over until the next season.

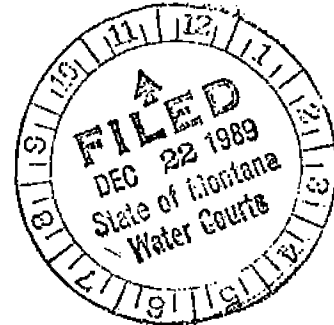
Wherefore, the Department respectfully requests this Court to decree the right 76GJ-W-119723 as indicated in the attached affidavit from Melvin F. McBeath, or to allow the Department further argument and/or evidence presentation herein.

Respectfully Submitted this 20th day of December, 1989.



Sarah A. Bond, Counsel
Department of Natural
Resources and Conservation

Sarah Bond
 Legal Counsel
 1520 East 6th Ave.
 Helena, MT. 59620
 Telephone: (406) 444-6699
 COUNSEL FOR THE DEPARTMENT OF NATURAL
 RESOURCES AND CONSERVATION



IN THE WATER COURTS OF THE STATE OF MONTANA
 CLARK FORK DIVISION
 FLINT CREEK (76 GJ)

, * * * * *

IN THE MATTER OF THE ADJUDICATION OF)	
THE EXISTING RIGHTS TO THE USE OF ALL)	AFFIDAVIT
THE WATER, BOTH SURFACE AND UNDERGROUND,)	
WITHIN THE FLINT CREEK DRAINAGE AREA,)	WATER RIGHT CLAIM
INCLUDING ALL TRIBUTARIES OF FLINT)	NO. 76GJ-W-119723
CREEK IN GRANITE AND DEER LODGE)	
COUNTIES, MONTANA)	

* * * * *

Pursuant to the Rules of Montana Water Court, the Department of Natural Resources and Conservation, as claimant (Department), hereby submits the following affidavit in support of its objection to the above captioned right.

I, Melvin F. McBeath, being duly sworn, do hereby depose and state as follows:


1. I am the hydrographer for the Department of Natural Resources and Conservation. I have been so employed for the past twenty-five years. In this capacity I am responsible for water measurement and records of historic water use by state water conservation projects, including the East Fork Rock Creek Reservoir Project.

2. The DNRC has historically stored water throughout each year in the East Fork Rock Creek Reservoir for future irrigation and other beneficial use in the project area.

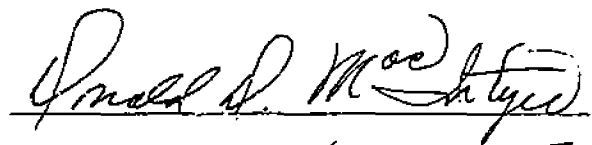
3. Attached is a copy of page 110 from Surface Water Supply of the United States 1961-1965 showing storage left 13,800 acre-feet of water remaining after the primary irrigation season, for subsequent use in the next season.

4. Based on these records, the DNRC asserts its storage right in this project should be 13,800 acre-feet.

Respectfully submitted this 19th day of December, 1989.


Melvin F. McBeath

Sworn before me this 19th day of December, 1989.



Residing at : HELENA, MT.
My commission expires: 12/15/90

12-3325. East Fork Rock Creek Reservoir near Philipsburg, Mont.

Location.--Lat 46°08'00", long 113°23'00", in NE 1/4 sec. 6, T.4 N., R.14 W., at dam on East Fork Rock Creek, 14 miles southwest of Philipsburg and at mile 9.7.

Drainage area.--30.3 sq mi.

Records available.--October 1939 to September 1965 (seasonal records only for most years 1946-60, 1964). Records for October 1955 to April 1956, published in WSP 1446, have been found to be unreliable and should not be used. May to August 1948 scattered daily contents, published in WSP 1080.

Gage.--Elevations determined at or near end of month by hand levels from reference points. Datum of gage is at mean sea level (levels by Montana Water Conservation Board).

Extremes.--Maximums and minimums (contents in acre-ft, elevation in feet) for March 1960 to September 1965 are contained in the following table:

Water year	Maximum observed			Minimum observed		
	Date	Contents	Elevation	Date	Contents	Elevation
1960	June 15, 1960	a 16,040	6,055.5	Aug. 31, 1960	a 5,400	6,022.5
1961	June 30, 1961	13,910	6,050.0	Aug. 31 to Sept. 14	0	-
1962	June 30, 1962	14,880	6,052.5	Oct. 16, 1961	1,520	6,003.5
1963	June 30, 1963	16,440	6,056.5	Oct. 1, 1962	5,780	6,024.0
1964	June 30, 1964	16,040	6,055.5	Oct. 1, 1963	6,450	6,026.5
1965	June 30, July 31	16,040	6,055.5	May 1, 1965	6,580	6,027.0

a Not previously published.

1939-65: Maximum contents observed, in excess of 16,000 acre-ft when reservoir was full and spilling at times in several years; no storage Sept. 1, 1955, Aug. 31 to Sept. 14, 1961.

Remarks.--Reservoir is formed by earthfill dam with concrete spillway completed in 1937; storage began in 1936. Usable contents, 16,040 acre-ft at elevation 6,055.5 ft. Dead storage unknown. Water is used for irrigation and recreation. Figures given herein represent usable contents.

Cooperation.--Records furnished by Montana Water Conservation Board.

Revisions.--WSP 1316: Drainage area. See also Records available.

Corrections.--In WSP 1736, the month-end contents for May 1958 is listed in error; it should be 14,100 acre-ft.

MONTH-END CONTENTS, IN ACRE-FEET, WATER YEARS 1951-58, 1960-65

YEAR	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APR.	MAY	JUNE	JULY	AUG.	SEPT.
1951	-	-	-	-	-	-	-	16,000	16,000	15,800	11,750	8,900
1952	-	-	-	-	-	-	-	14,710	13,350	9,530	6,290	4,250
1953	-	-	-	-	-	-	-	7,660	13,710	11,280	6,640	4,320
1954	-	-	-	-	-	-	-	10,330	11,480	9,680	-	-
1955	-	-	-	-	-	-	16,000	-	-	-	0	2,620
1956	-	-	-	-	-	-	-	14,460	14,520	12,220	6,090	3,850
1957	-	-	-	-	-	-	-	14,900	11,120	5,780	-	1,690
1958	-	-	-	-	-	-	-	14,100	16,040	15,630	10,860	5,100
1960	-	-	-	-	-	10,430	10,160	14,430	14,410	9,250	5,400	4,800
1961	5,910	6,860	7,560	a 8,290	8,960	a 9,630	a 10,630	12,150	13,910	5,400	b 0	a 761
1962	a 2,020	a 2,810	3,860	a 4,480	5,020	5,780	6,450	9,220	14,880	a 11,220	c 7,280	5,780
1963	7,000	7,860	8,750	9,370	10,010	10,650	11,310	12,700	16,440	14,490	7,140	6,450
1964	-	-	-	-	-	-	-	a 13,500	16,040	a 15,600	a 13,700	a 11,500
1965	a 11,810	a 12,850	a 13,200	a 12,850	a 12,150	a 10,160	a 6,580	c 7,860	16,040	16,040	c 14,800	c 13,800

a Interpolated on basis of readings made weekly or less frequently.

b Estimated.

c Figure of contents on first day of following month.

Note.--Figures prior to water year 1961 not previously published.

Location.--Lat 46°08'00", long 113°23'00", in NE 1/4 sec. 6, T.4 N., R.14 W., at dam on East Fork Rock Creek, 14 miles southwest of Philipsburg and at mile 9.7.

Drainage area.--30.3 sq mi.

Records available.--October 1939 to September 1965 (seasonal records only for most years 1946-60, 1964). Records for October 1955 to April 1956, published in WSP 1446, have been found to be unreliable and should not be used. May to August 1948 scattered daily contents, published in WSP 1080.

Gage.--Digital w. To Apr. 30, 1942, Apr. 30, 1942, ferent datum, datum.

Extremes.--Maximums and minimums (contents in acre-ft, elevation in feet) for March 1960 to September 1965 are contained in the following table:

Date	Annual	
	Contents	Elevation
Feb. 10, 1961	13,910	6,050.0
May 27, 1961	14,880	6,052.5
May 31, 1961	16,440	6,056.5
Mar. 27, 1962	16,040	6,055.5
Apr. 4, 1962	21,000	6,100.0
Apr. 15, 1962	23,000	6,150.0
May 13, 1962	18,000	6,080.0
May 24, 1962	22,000	6,120.0

a Backwater from

Water year	Aug.	Feb.
1961	13,910	13,910
1962	14,880	14,880
1963	16,440	16,440

a Minimum daily

1939-65: in use) from Creek Reservoir from diversion

Remarks.--Record record, which

DAY	CT.	ELEV.
1	16	10
2	10	10
3	10	10
4	10	10
5	10	10
6	10	10
7	10	10
8	11	11
9	11	11
10	11	11
11	12	12
12	13	13
13	13	13
14	13	13
15	13	13
16	13	13
17	13	13
18	14	14
19	14	14
20	14	14
21	17	17
22	17	17
23	17	17
24	17	17
25	14	14
26	16	16
27	16	16
28	16	16
29	16	16
30	16	16
31	17	17
TOTAL	437	
MEAN	14.1	
MAX	18	
MIN	10	
AC-FT	867	

CAL YR 1960: TOT

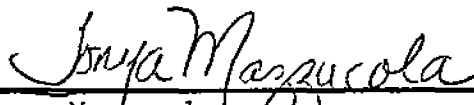
WAT YR 1961: TOT

Note.--No gage

CERTIFICATE OF SERVICE

I, Tonya Mazzucola, hereby certify that I mailed a true and correct copy of the foregoing AFFIDAVIT AND BRIEF to each of the persons at their addresses as shown below by placing said copies in envelopes, securely sealed, with postage thereon prepaid, and thereafter depositing them in the United States Mail at Helena, Montana.

DATED this 21st day of December, 1989.



Tonya Mazzucola
Administrative Assistant
Department of Natural Resources
and Conservation
1520 East Sixth Avenue
Helena, MT 59620

Flint Creek Water Users' Association
Ed Lord, President
Phillipsburg, MT 59858

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Big Timber, MT 59011