

IN THE WATER COURT OF THE STATE OF MONTANA

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FILED

NOTICE OF FILING OF MASTER'S REPORT

AUG 13 1993

Montana Water Court

TO: ALL PARTIES

RE: Case 41G-109, claims 41G-W-119378-00, 119380-00, 119383-00,  
119384-00, 119410-00, 119411-00, 119416-00, 119417-00

This is to provide you with Notice that the Water Master has filed a Master's Report (Findings of Fact and Conclusions of Law) with the Clerk of the Water Court for the water right(s) listed above. A copy of the Master's Report is enclosed with this Notice.

Please review this Master's Report carefully. If there are any corrections or changes that need to be made, you have 10 days from service of this Notice to file a written objection. You must mail a copy of your written objection to all the other parties who have been involved in this proceeding and file a certificate of such mailing with the Water Court. (This procedure is required by Rule 1.II. Water Right Claims Examination Rules and by Rules 5 and 53 of the Montana Rules of Civil Procedure.)

DATED this 13th day of August 1993.

LORI M. BURNHAM  
Clerk of Court  
Montana Water Court  
P. O. Box 879  
Bozeman, MT 59771-0879  
(406) 586-4364  
1-800-624-3270 (in Montana)

FILED

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
JEFFERSON RIVER BASIN (41G)

AUG 13 1993

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\* \* \* \* \* Montana Water Court

IN THE MATTER OF THE ADJUDICATION ) CASE NO. 41G-109  
OF THE EXISTING RIGHTS TO THE USE ) 41G-W-119378-00  
OF ALL THE WATER, BOTH SURFACE AND ) 41G-W-119380-00  
UNDERGROUND, WITHIN THE JEFFERSON ) 41G-W-119383-00  
RIVER DRAINAGE AREA, INCLUDING ALL ) 41G-W-119384-00  
TRIBUTARIES OF THE JEFFERSON RIVER ) 41G-W-119410-00  
IN BROADWATER, GALLATIN, MADISON, ) 41G-W-119411-00  
JEFFERSON AND SILVER BOW COUNTIES, ) 41G-W-119416-00  
MONTANA. ) 41G-W-119417-00  
)

CLAIMANT: Montana Department of Natural Resources and Conservation  
MOTION OF MONTANA WATER COURT

OBJECTORS: Montana Department of Natural Resources and Conservation,  
United States of America (Bureau of Reclamation)

MASTER'S REPORT

FINDINGS OF FACT

1. The Montana Department of Natural Resources and Conservation (DNRC) filed Statements of Claim for Existing Water Rights 41G-W-119378-00, 41G-W-119380-00, 41G-W-119383-00, 41G-W-119384-00, 41G-W-119410-00, 41G-W-119411-00, 41G-W-119416-00 and 41G-W-119417-00. The United States of America (Bureau of Reclamation) objected to the ownership, volume, place of use, acres irrigated, source and point of diversion of all of these water right claims except for claim 41G-W-119417-00. The United States did not object to this claim.

2. Water right claim numbers 41G-W-119378-00 and 41G-W-119383-00 were called in on Motion of the Montana Water Court because it appeared that these claims may be duplicates.

3. Water right claim numbers 41G-W-119380-00 and 41G-W-119384-00 were called in on Motion of the Montana Water Court because it appeared that these claims may be duplicates.

4. Water right claim numbers 41G-W-119410-00 and 41G-W-119416-00 were called in on Motion of the Montana Water Court because it appeared that these claims may be duplicates.

5. Water right claim numbers 41G-W-119411-00 and 41G-W-119417-00 were called in on Motion of the Montana Water Court because it appeared that these claims may be duplicates.

6. On July 30, 1993 the parties filed a Stipulation with the Montana Water Court resolving the issues raised on the objections of the United States and the issues raised on Motion of the Montana Water Court. In the Stipulation, the DNRC withdrew Statements of Claim Numbers 41G-W-119383-00, 41G-W-119384-00, 41G-W-119411-00, 41G-W-119416-00 and 41G-W-119417-00. The parties further agreed that the following changes should be made to water right claims 41G-W-119378-00, 41G-W-119380-00 and 41G-W-119410-00:

WATER RIGHT NUMBER 41G-W-119378-00

PRIORITY DATE: OCTOBER 24, 1935

VOLUME: 32,792.00 ACRE FEET PER YEAR

PERIOD OF USE: APRIL 1 TO OCTOBER 31

THE PERIOD OF DIVERSION FROM THE SOURCE INTO THIS RESERVOIR IS JANUARY 1 THROUGH DECEMBER 31

WATER RIGHT NUMBER 41G-W-119380-00

PRIORITY DATE: OCTOBER 24, 1935

VOLUME: 5,338.00 ACRE FEET PER YEAR

PERIOD OF USE: APRIL 1 TO OCTOBER 31

THE PERIOD OF DIVERSION FROM THE SOURCE INTO THIS RESERVOIR IS JANUARY 1 THROUGH DECEMBER 31

WATER RIGHT NUMBER 41G-W-119410-00

PRIORITY DATE: JULY 15, 1957

VOLUME: 9,521.00 ACRE FEET PER YEAR

PERIOD OF USE: APRIL 1 TO OCTOBER 31

THE PERIOD OF DIVERSION FROM THE SOURCE INTO THIS RESERVOIR IS JANUARY 1 THROUGH DECEMBER 31

7. The stipulation also states that these rights were historically used by the State Water Conservation Board for storage of water, in addition to the claimed purpose of historic irrigation use. The Department is the successor-in-interest to the Board as claimant.

CONCLUSIONS OF LAW

I

The Montana Water Court has jurisdiction to review all objections to temporary preliminary decrees pursuant to Mont. Code Ann. §85-2-233.

## II

The Montana Water Court has jurisdiction over all matters relating to the determination of existing water rights and may consider a matter within the Court's jurisdiction on its own motion. Mont. Code Ann. §3-7-224.

## III

Upon review of the Stipulation, 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. . . ."

Generally, storage of a water right entails the capturing or impounding of water that will later be put to a beneficial use. See generally Matter of Dearborn Drainage Area, 234 Mont. 331, 339-40, 766 P.2d 228 (1988). Generally, the use to which the water was to be applied did not need to be immediate; it could be prospective or contemplated if the appropriation was carried out with reasonable diligence. Bailey v. Tintinger, 45 Mont. 154, 175, 122

P. 575 (1912). In the case of appropriations by the State Water Conservation Board, however, the statutes apparently gave storage a "life of its own" as a separate and distinct beneficial use of water. The Board's statutory mission was conservation, development, storage, distribution and utilization of water. Under these statutes, it appears that the Board was entitled to store water simply for the sake of storing it. The Board could then later put the water so appropriated to any beneficial uses it saw fit, regardless of whether a specific use was contemplated when the declaration was filed.

V

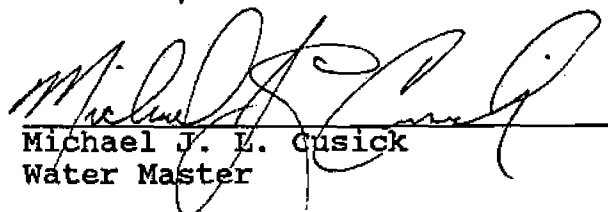
Based on the above statutes, the following remark should appear on these claims:

PURSUANT TO SECTION 89-121 R.C.M. (1933) THIS  
RIGHT IS ALSO USED FOR STORAGE PURPOSES.

VI

The changes to priority date, volume and period of use stated in the Findings of Fact should be made to correct the Temporary Preliminary Decree in the Jefferson River Basin (41G).

DATED this 13<sup>th</sup> day of August 1993.

  
Michael J. L. Cusick  
Water Master

CERTIFICATE OF SERVICE


I, Janet Fulcher, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above MASTER'S REPORT, FINDINGS OF FACT, CONCLUSIONS OF LAW was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Mt. Dept. of Natural Resources and Conservation  
Sarah Bond, Attorney  
1520 E. 6th Ave.  
Helena, MT 59620

United States of America  
Bureau of Reclamation  
P. O. Box 30137  
Billings, MT 59107-0137

David W. Gehlert, Attorney  
U. S. Dept. of Justice  
Environment & Natural Resources Division  
P. O. Box 663  
Washington, DC 20044

DATED this 13 day of August 1993.

  
\_\_\_\_\_  
Janet Fulcher  
Deputy Clerk of Court

FILED

JUL 30 1993

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
JEFFERSON RIVER BASIN (41G)

\* \* \* \* \*

Montana Water Court

IN THE MATTER OF THE ADJUDICATION	)	
OF THE EXISTING RIGHTS TO THE USE	)	
OF ALL THE WATER, BOTH SURFACE AND	)	WATER RIGHTS CASE
UNDERGROUND, WITHIN THE JEFFERSON	)	NO. 41G-109
RIVER DRAINAGE AREA, INCLUDING ALL	)	
TRIBUTARIES OF THE JEFFERSON RIVER	)	
IN BROADWATER, GALLATIN, MADISON,	)	STIPULATION
JEFFERSON AND SILVER BOW COUNTIES,	)	
MONTANA.	)	

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The Department of Natural Resources and Conservation, as Claimant, through its attorney Sarah A. Bond, and the Objector, United States of America, Bureau of Reclamation, through its attorney Eric S. Gould, move this Court to accept this Stipulation in settlement of objections to the following water rights claims:

I. Claim No. 41G-W-119378

A. The correct priority date for this claim is October 24, 1935. The priority date for the State Water Conservation Board's rights is the date of filing, § 349.18, R.C.M. (1947).

B. The correct volume for the Willow Creek right is 32,792 acre-feet. This is calculated as the one fill for storage, based on historic operation, plus one fill for use in the irrigation season for irrigation (also based on historic use), plus 2,670 acre-feet for evaporation times 86% which is the percent contribution to Willow Creek Reservoir from Willow Creek.  $(17,730 \times 2 + 2670 \times .86)$  The total amount stored in this reservoir is 38,130. Of this total amount historically put to beneficial use in Willow Creek Reservoir, approximately 86% is contributed by Willow Creek. This 32,792 is, therefore, 86% of the total amount of water used through Willow Creek



Reservoir. See, 41-G-W-119380 for the 14% contributed to by Norwegian Creek.

C. Use - The use should be amended to add storage as a valid use (uses are irrigation and storage). This is based on the unique appropriative rights of the State Water Conservation Board, predecessor in interest to the Department as Claimant. The Department's right to a storage claim is recognized by Water Court decision in the East Fork Rock Creek Reservoir Claim. Order adopting Master's Report 76GJ-W-119723, dated July 2, 1990.

D. Period of Use - Period of use should be amended to read: The period of use for irrigation is April 1 through October 31. The period of use for impoundment is January 1 through December 31.

## II. Claim 41G-W-119380

A. The correct priority date for this claim is October 24, 1935. The priority date for the State Water Conservation Board's rights is the date of filing § 349.18 R.C.M. (1947).

B. The correct volume for this right is 5,338 acre-feet. This is calculated as 14% of the total amount appropriated through this reservoir, based on available information regarding the relative contribution of Willow and Norwegian Creeks to this reservoir. See paragraph I.B. above for the total appropriation through this reservoir.

C. Use - This use should be amended to include storage (uses are storage and irrigation).

D. Period of Use - Period of use should be amended to read: The period of use for irrigation is April 1 through October 31. The period of use for impoundment is January 1 through December 31.

III. Claim No. 41G-W-119383

41G-W-119383 has been withdrawn.

IV. Claim No. 41G-W-119384

41G-W-119384 has been withdrawn.

V. Claim No. 41G-W-119410

A. This claim should have a priority date of July 15, 1957 based on the date of filing the SWCB's notice of intent to store. (Section 349.18 R.C.M. (1947).)

B. The proper volume for this claim is 9,521 acre-feet calculated by one fill (7,980) plus evaporation (1,478) plus seepage (113 af).

C. Use - This claim should be amended to reflect its use for storage (in addition to irrigation).

D. Period of Use - Period of use should be amended to read: The period for use for irrigation is April 1 through October 31. The period of use for impoundment is January 1 through December 31.

VI. Claim 41G-W-119411

This claim has been withdrawn.

VII. Claim 41G-W-119416

This claim has been withdrawn.

VIII. Claim 41G-W-119417

This claim has been withdrawn.

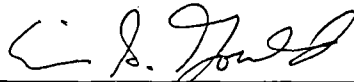
IX. The parties agree that acceptance of this Stipulation by the Court and entry of judgment in accordance herewith eliminates the need for further litigation in this case. This Stipulation has been entered into knowingly, voluntarily, and is not the result of improper influence.

X. Elements of these water rights not specifically amended herein are not in issue and should be decreed in the Preliminary Decree as they appear in the Temporary Preliminary Decree.

Respectfully submitted this 27<sup>th</sup> day of July, 1993.



SARAH A. BOND, Legal Counsel  
Dept. Natural Resources and  
Conservation



ERIC S. GOULD, Legal Counsel  
U.S. Bureau of Reclamation

FILED  
SEP 15 1993

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
JEFFERSON RIVER BASIN (41G)

SEP 15 1993

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IN THE MATTER OF THE ADJUDICATION	)	CASE NO. 41G-109
OF THE EXISTING RIGHTS TO THE USE	)	41G-W-119378-00
OF ALL THE WATER, BOTH SURFACE AND	)	41G-W-119380-00
UNDERGROUND, WITHIN THE JEFFERSON	)	41G-W-119383-00
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TRIBUTARIES OF THE JEFFERSON RIVER	)	41G-W-119410-00
IN BROADWATER, GALLATIN, MADISON,	)	41G-W-119411-00
JEFFERSON AND SILVER BOW COUNTIES,	)	41G-W-119416-00
MONTANA.	)	41G-W-119417-00

CLAIMANT: Montana Department of Natural Resources and Conservation  
MOTION OF MONTANA WATER COURT

OBJECTORS: Montana Department of Natural Resources and Conservation,  
United States of America (Bureau of Reclamation)

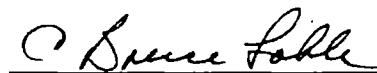
ORDER ADOPTING MASTER'S REPORT

Pursuant to Montana Code Annotated, §85-2-233(4), the above entitled case was assigned to Water Master Michael J. L. Cusick. On August 13, 1993 the Water Master issued a report containing Findings of Fact and Conclusions of Law. Copies of the report were served upon the parties. Over ten (10) days have elapsed since service, and no objections to the Findings and Conclusions have been filed by any party.

The Court has reviewed carefully the Water Master's Findings and Conclusions. Pursuant to Rule 53(e), Montana Rules of Civil Procedure, the Court adopts the Master's Report and

ORDERS that changes recommended in the Master's Conclusions of Law be made to the abstract of claims referenced above as they appear in the Temporary Preliminary Decree of the Jefferson River Basin (41G).

DATED this 14<sup>th</sup> day of September 1993.



C. Bruce Loble  
Chief Water Judge

CERTIFICATE OF SERVICE


I, Janet Fulcher, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above ORDER ADOPTING MASTER'S REPORT was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Mt. Dept. of Natural Resources and Conservation  
Sarah Bond, Attorney  
1520 E. 6th Ave.  
Helena, MT 59620

United States of America  
Bureau of Reclamation  
P. O. Box 30137  
Billings, MT 59107-0137

David W. Gehlert, Attorney  
U. S. Dept. of Justice  
Environment & Natural Resources Division  
P. O. Box 663  
Washington, DC 20044

DATED this 15 day of September 1993.

  
\_\_\_\_\_  
Janet Fulcher  
Deputy Clerk of Court