

Montana Water Court  
PO Box 1389  
Bozeman, MT 59711-1389  
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**FILED**

**JUN 30 2015**

**Montana Water Court**

IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
CLARK FORK RIVER BASIN ABOVE THE BLACKFOOT RIVER (76G)

\*\*\*\*\*

CLAIMANT: United States of America (USDA Forest Service)

**CASE 76G-505**  
76G 50653-00

NOIA: United States of America (USDA Forest Service)


ON MOTION OF THE MONTANA WATER COURT

**ORDER ADOPTING AMENDED MASTER'S REPORT**

Pursuant to Montana Code Annotated, § 85-2-233(5), the above entitled case was assigned to Senior Water Master Kathryn L. W. Lambert. The Senior Water Master filed a report containing Findings of Fact and Conclusions of Law with the Clerk of Court. Copies of the report were served upon the parties on June 5, 2015. The time for filing objections has elapsed. No objections to the Findings and Conclusions have been filed by any party.

Pursuant to Rule 53(e), Montana Rules of Civil Procedure, the Court **ADOPTS** the Amended Master's Report and its Recommendations, and **APPROVES** the changes to the centralized computer record system that are reflected on each abstract served with the report.

DATED this *30* day of *June*, 2015.

  
Douglas Ritter  
Associate Water Judge

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ON MOTION OF THE MONTANA WATER COURT

**NOTICE OF FILING AMENDED MASTER'S REPORT**

You may file a written objection to this Amended Master's 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 Amended Master's Report was filed and mailed. Rule 23 of the Water Adjudication Rules requires 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 Amended 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 Amended Master's Report.

## AMENDED MASTER'S REPORT

Jack A. Perkins objected to the ownership, priority date, and purpose of right of the United States of America (USDA Forest Service) [USFS] fish and wildlife claim 76G 50653-00. The claim was also called in on motion of the Montana Water Court due to the "no right" remark questioning whether the purpose (use) claimed is a beneficial use of water and whether this claim is for a valid appropriation of water. The USFS filed a Notice of Intent to Appear.

The hearing was held on April 1, 1998. Jack Perkins and John Perkins testified for Perkins. Perkins exhibits A-1, A-2, A-3, A-4, and A-5 were admitted without objection. Errol Hammond testified for the USFS. United States of America exhibits G-1, G-2, G-3, and G-4 were admitted without objection.

The Master's Report was filed on October 14, 1999. The Master's Report recommended dismissal of this USFS fish and wildlife claim because it was not a valid water right based on the ruling in *Matter of the Adjudication of Existing Rights*, 234 Mont. 331, 343, 766 P.2d 228 (1988) [*Bean Lake I* decision] which held:

***It is clear therefore that under Montana law before 1973, no appropriation right was recognized for recreation, fish and wildlife, except through a Murphy right statute. ... [T]he DFWP and the public could not have intended an appropriation where none was recognized by law, and for the same reason, adverse appropriators could not have had notice of such a claim." Id. at 343 (emphasis added). The Supreme Court held that the DFWP had no appropriation right in Bean Lake and, therefore, no existing right protected by Article IX, Section 3 of the Constitution of the State of Montana. Again, the conclusion does include a limitation based on diverted or non-diverted - no appropriation rights for recreation, fish and wildlife uses were recognized prior to 1973.***

(***Emphasis*** added.) The United States Objection To Master's Report, including briefing, was filed on November 12, 1999. On November 18, 1999 Chief Water Judge C. Bruce Loble issued an Order Setting Briefing Schedule And Deadline To File Application For Hearing On Objection To Master's Report. Mr. Perkins did not file a response to the USFS Objection To Master's Report. Neither party filed an application for hearing.

On September 12, 2000 Judge Loble entered an Order Staying Proceedings due to

ongoing proceedings before the Montana Supreme Court revisiting its *Bean Lake I* decision, in particular as stated in this Order: "Did the Montana Supreme Court in *Bean Lake I* erroneously conclude that 'it is clear therefore that under Montana law before 1973, no appropriation right was recognized for recreation, fish and wildlife, except through a Murphy right statute'?" On October 16, 2002 an Order Dissolving Stay and Recommitting Case to Water Master was entered stating that the Montana Supreme Court decision was issued and that it overruled its *Bean Lake I* decision that "under Montana law before 1973, no appropriation right was recognized for recreation, fish and wildlife, except through a Murphy right statute." The Montana Supreme Court decision is *Matter of the Adjudication of Existing Rights*, 2002 MT 216, [*Bean Lake III* decision]. Application of the *Bean Lake III* decision to the various fish and wildlife, wildlife, and recreation claims in this ongoing adjudication was delayed while rules for claim examination and adjudication of claims for these purpose, whether diverted or instream, were drafted for submission to and review by the Montana Supreme Court. These additional rules were included in the general rules revision Order from the Montana Supreme Court dated December 6, 2006.

On April 8, 2008 an Order Setting Deadlines was issued for filing a substitution of objector Jack A. Perkins (deceased) by the Estate of Jack A. Perkins; for the Estate of Jack A. Perkins to retain counsel and file a notice of appearance as required by Rules 16(c) and 33, W.R.Adj.R. if it chose to substitute as the objector; for the USFS to file supplemental briefing concerning the *Bean Lake III* decision; for the Estate of Jack A. Perkins, if substituted as objector, to file an answer brief, if it so chose, and for the USFS to then file a reply brief. On May 22, 2008 the USFS filed a Supplemental Brief. Nothing was filed by the Estate of Jack A. Perkins. On June 23, 2008 an Order Updating Caption And Mailing List was entered removing Jack Perkins from both the caption and the mailing list as no substitution of party was filed.

The 2006 Montana Supreme Court Order revising the Water Right Claim Examination Rules did not include adding a rule for examining the flow rate and volume of inlake claims for fish and wildlife purpose. Directions for examining and decreeing the flow rate and volume for claimed inlake fish and wildlife rights were provided in the April

17, 2013 Supplemental Order Regarding Fish and Wildlife, Wildlife, And Recreation Claims - Statewide 2013, issued by then Associate Water Judge Russ McElyea. Inlake claim flow rate and volume are not governed by the instream rule (Rule 29(d), W.R.C.E.R.) but by the onstream reservoir rule (Rule 29(c)(1), W.R.C.E.R.)

As the flow rate and volume were simply deleted from the abstract of claim because the "no right" issue remark was added and the claim file clearly indicates these elements were not reviewed during pre-decree verification and, in particular, as Rule 29(c)(1), W.R.C.E.R. requires a quantified volume, an opportunity for the USFS and DNRC to review the claimed flow rate and volume in light of Rule 29, W.R.C.E.R. and the April 17, 2013 Supplemental Order Regarding Fish and Wildlife, Wildlife, And Recreation Claims - Statewide 2013 which is now being used to prepare Preliminary Decrees following Temporary Preliminary Decrees. The Request For Assistance was filed on March 19, 2015 and was sent to counsel for the USFS. On May 1, 2015 Matt Murphy, DNRC Water Resource Specialist Supervisor, filed his Memorandum - Request For Assistance and a copy of a letter he sent to USFS counsel requesting additional information about the volume in order to determine the volume guideline. The Memorandum states that the USFS did not provide any additional information and he could not determine a volume guideline for this claim. As there was no evidence presented at hearing providing a volume quantification and as the USFS did not respond to this opportunity to review the claimed volume, there is no information in the record concerning the volume quantification other than the volume originally claimed.

Upon review of the claim file, case file, testimony, exhibits, and arguments; the Objection to Master's Report and the USFS Supplemental Brief; the *Bean Lake III* decision; the December 11, 2008 Amended Order on Period of Diversion - Statewide and the November 10, 2014 Second Amended Order On Period of Diversion - Statewide; Rule 29, W.R.C.E.R., and the Supplemental Order Regarding Fish and Wildlife, Wildlife, And Recreation Claims - Statewide 2013, the following Findings of Fact and Conclusions of Law are made:

## FINDINGS OF FACT

1. United States of America (USDA Forest Service) claim 76G 50653-00 was filed in accordance with section 85-2-221, MCA, and therefore, is prima facie proof of its content. Its content includes the following elements: a use right, priority date August 26, 1911, for .1 cfs (4 miner's inches or 44.88 gpm) and 1 acre foot per year of Martin Lake water for instream fish and wildlife purposes. In accordance with the customary procedures at the time the Temporary Preliminary Decree for Basin 76G was issued, the abstract for this instream fish and wildlife claim did not have a quantified flow rate and volume, the means of diversion was not included, and the following standard "no right" remark was added:

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

At hearing, the United States specified that the water claimed is the residual volume of water in Martin Lake after the Jack A. Perkins [Perkins] impoundment has been released.

2. This claim is filed as a use right, a right founded upon Montana prior appropriation doctrine and law. This is not a claim for a reserved water right or a water right based upon other federal law.

3. Martin Lake is a naturally occurring lake in a cirque basin below Mount Powell, in the Flint Creek Range. It is in the Deer Lodge National Forest and lies across the four common corners of sections 16, 17, 20 and 21, T7N, R11W, Powell County. At an elevation of 8600 feet, the Lake is at the head of the drainages for Tin Cup Joe Creek and a fork of Dempsey Creek, but has no natural outflow. The Lake is not on a stream channel nor is it stream fed. The supply of water comes from springs, snow melt, and runoff. The surrounding area is rocky with very little dirt. At maximum level Martin Lake has a surface area of about 37 acres and at lowest level, when drawn down to the bottom of Perkins' outflow works, a surface area of about 22 acres. Martin Lake is 50 to 60 feet deep.

4. There are three dams on Martin Lake.

The north dam, near Tin Cup Joe Creek, is relatively small, about 10 to 12 feet long and 2 to 3 feet high, and is in the ditch which would have let water down to Tin Cup Joe

Creek. Perkins testified that the dam may have been associated with early efforts by the warden at the State Prison to blast a ditch through the rock to divert water to Tin Cup Joe Creek for use at the prison ranch. No other testimony was offered concerning the historical use of this dam. As there was testimony that this dam is not a control or impoundment structure, *perhaps* the dam was an attempt to rehabilitate the disturbance caused by the blasting.

A second dam is located on the west side of the Lake. This dam is about 80 feet long and 5 feet high. It was added for safety in 1976 in case there ever are problems with the Perkins dam and an emergency outflow is needed for the water impounded by Perkins. It was built one foot lower than the Perkins dam so that water would spill over it rather than wash out the Perkins dam.

The third dam is the Perkins dam on the south side of Martin Lake. The Perkins dam is 108 feet long, 6 feet high, and 5 feet wide at the crest. This dam impounds a four foot layer of water on top of the natural level of Martin Lake, for a total of 70 acre feet of water. A gated pipe at the base of the dam is the outflow mechanism. Perkins testified that this outflow pipe rests on bedrock, and that water never was and could not be withdrawn below the level of the outflow pipe.

5. Errol Hammond is the resource assistant to the Ranger for the Deer Lodge Ranger District. Since 1978, he has been responsible for the area's recreation, minerals, roads, trails and special use permits. Hammond has been to Martin Lake in connection with these various responsibilities. Hammond testified that the outflow pipe rests on the bedrock which is part of the natural confining structure for the Lake. Hammond testified that after Perkins takes the 70 acre feet of water off the top of the Lake, the remaining pool, the residual volume, is very near the volume of the original, natural Lake itself. Hammond also testified that there is no outflow, natural or manmade, for the residual volume of the Lake. United States Exhibit G-3, photos taken by Hammond in 1983, show the Perkins dam, the outflow, and the natural pool of Martin Lake after the Perkins withdrawal. The only way Perkins could take water from the natural pool, would be to remove part of the bedrock itself and lower the outflow pipe. Hammond testified that the Perkins dam has no control or impact on

the natural pool of Martin Lake.

6. Perkins' testimony, Perkins Exhibits A-3, A-4 and A-5, Hammond's testimony, and United States Exhibit G-2 provide the following history of the dam and the special use permits on Martin Lake:

- The original Notice of Water Right was filed by William Martin on January 1, 1894. The Notice states that the entirety of Lake was appropriated by Martin on January 1, 1893.
- The special use permit to build the dam was issued to John Martin, Jr. on August 26, 1911.
- The original dam was built by Martin in about 1911. Two of the men who replaced this dam in 1921, told Perkins that the original dam was log cribbing with dirt fill.
- The dam was replaced in 1921. The old dam was leaking so it was ripped out and a dirt dam was built.
- Special use permit was issued for reconstructing the dam and to maintain the reservoir for the additional 70 acre feet issued to Henry G. Huot on June 4, 1954.
- Special use permit to use and maintain the reservoir and dam was issued to Perkins in 1970.
- The current dam was built by Perkins, two of his sons and two of his brothers-in-law in 1975. The 1921 dirt dam was leaking due to rodent damage and had to be replaced. The current rock dam took 31 days to build by hand using tools, supplies, and materials, including the fill dirt which had to be packed in by horse because mechanized vehicles were not allowed in the area.
- Special use permit to use the reservoir and to rehabilitate and maintain the main and west dams was issued to Perkins in 1976.
- Special use permit to use and maintain the reservoir and dam was issued to Perkins in 1987.

7. Perkins claim 76G 91362-00 is for an impoundment of 70 acre feet in Martin Lake, priority date January 1, 1893. Judicial notice is taken that the USFS did not file an objection to the Perkins claim. Rule 202(b)(6), Mont.R.Evid.



8. Hammond testified that there are no structures on Martin Lake which control the natural lake water, the residual volume after the Perkins water is released, and that there is no outflow of the residual volume. The north dam is not a control structure. The west dam is not a control structure related to the natural pool. It is an emergency outflow related to the Perkins impoundment. The south dam is not a control structure related to the natural pool of Martin Lake. The only water controlled by a control structure is the Perkins impoundment which is above the natural lake level.

9. The priority date claimed and specified in the Temporary Preliminary Decree for claim 76G 50653-00 is August 26, 1911. Although the claim states that it is for a use right, no historical details describing the original appropriation and use were included with the claim. No testimony or argument was given at hearing providing the historical details supporting the claimed priority date. It is noted that this is the same date on the first special use permit granted to John Martin, Jr., evidence of the first ownership or management act of the USFS concerning Martin Lake.

10. The Perkins objection states that "this lake was taken up in 1893 by Martin before the forest service was formed." Perkins testified that he does not think the USFS should have a water right in Martin Lake for recreation, fish and wildlife purposes because he thinks such uses are not beneficial uses of water, and questioned why the USFS wanted or needed such a water right. These general arguments questioning whether the USFS should own such a right do not address the actual ownership (identity of owner), priority date, or historical basis of the claim. Perkins did not present any evidence contradicting and overcoming the ownership and priority date specified in the prima facie claim.

11. Martin Lake and its surrounds are part of the Deer Lodge National Forest. The primary uses of the area are fishing and camping. The area is also used for hiking, sightseeing and some hunting (mountain goat and elk). This area is included in the Deer Lodge National Forest recreation guide for high mountain lakes.

12. Martin Lake management activities include administration of special use permits. Perkins and his predecessors are the only people who have been issued special use permits for Martin Lake.

Hammond testified that the Forest Plan includes management of the westslope cutthroat. Hammond testified that the westslope cutthroat is a "sensitive species" which means that its habitat is threatened. The management activities described by Hammond concerning the westslope cutthroat include taking fish population surveys and stocking when the population gets low. Martin Lake may have been stocked with rainbow trout in the 1960s and early 1970s. The Lake was later stocked with westslope cutthroat trout. The Forest Service survey in 1989-1990 included a gill-net survey of the Lake. No fish were caught. The Lake was again stocked with westslope cutthroat trout in 1990. Hammond testified that if the population again dwindles, the Lake it will probably be stocked again.

13. There are no users of Martin Lake water other than Perkins and the fishing and recreation public as permitted by the USFS.

14. Perkins testified and argued that using water for recreation, fish and wildlife purposes is not a beneficial use of water. Perkins' son, John Perkins, testified that when his dad was building the dam, that he (John) was packing supplies in every day and that he fished Martin Lake every night for a week. He only caught two or three fish that week. The apparent purpose of this testimony is to characterize Martin Lake as a poor fishery, thus evidencing either no management or poor management. Perkins did not present any other evidence which contradicts and overcomes the claimed fish and wildlife purpose.

15. The water claimed by the United States is water within the naturally occurring lake itself. Hammond testified that the United States claims the residual volume of Martin Lake after all senior valid claims to Martin Lake have been satisfied. Hammond testified that there is no intake or outflow structure, no man made diversion or impoundment structure which diverts, impounds or withdraws the water for the United States' use. Clearly the use of water for fish habitat and for fishing are entirely inlake rather than diverted. There is no diversion, impoundment or withdrawal involved in the USFS use of Martin Lake. Therefore, USFS claim 76G 50653-00 is for inlake fish and wildlife use of Martin Lake water.

16. The USFS has exercised control and management of Martin Lake usage by the special use permits since 1911 which have allowed and regulated the building of the Perkins

dam and its precursors, and thereby allowed the impoundment of the Perkins 70 acre-feet of water. No other permits for any other developments at Martin Lake have been granted. The Martin Lake area is included in the Deer Lodge National Forest recreation guide for high mountain lakes. The primary uses of the area are fishing and camping. The area is also used for hiking, sightseeing and some hunting (mountain goat and elk). Errol Hammond, resource assistant to the Ranger for the Deer Lodge Ranger District, testified that the Forest Plan includes management of the westslope cutthroat trout, that the westslope cutthroat trout is a sensitive species with threatened habitat, that USFS Martin Lake management activities for the westslope cutthroat trout include taking fish population surveys and twice stocking Martin Lake when the population gets low, and that the USFS will likely stock the Lake again if needed. The USFS actions controlling access, use and development of the Martin Lake area exhibit the deliberate efforts to maintain a remote mountain lake recreation, wildlife, and fishery site for the public. Although in its early stages at the time of the hearing, the additional management activities to monitor and improve the habitat for westslope cutthroat trout also exhibits the intent to improve and maintain a viable westslope cutthroat trout fishery in Martin Lake for public fishing.

Although the permitting management process is unseen by the public and although the location is remote such that the fish survey activities and stocking activities may not have actually been observed at any particular time by the public, the effect of these activities are discernable as evidenced by the maintenance of this remote site as a remote mountain lake recreation, wildlife, and fishery destination. The primary member of the public who regularly was at Martin Lake was Perkins. He did not present any evidence disputing the wildlife use. Perkins' son, John Perkins, testified that in 1975 when the Perkins dam was rebuilt, he was there, fished every evening for a week, and only caught two or three fish.

The USFS management activities to maintain the natural character of Martin Lake as a remote mountain lake fishing and camping destination promoted in its recreation guide and its management activities to monitor and maintain the westslope cutthroat trout fishery in Martin Lake for the fishing public, are sufficient "other facts and surrounding circumstances" to prove the USFS intent to appropriate water within Martin Lake for fish

and wildlife use as well as notice of such intent to appropriate water in Martin Lake for fish and wildlife use.

17. As fish and wildlife is a beneficial use of water, as non-diversionary appropriations made prior to July 1, 1973 may be valid appropriations of water, as the actions of the USFS evidence both its intent to appropriate and provided notice of its intent to appropriate a non-diversionary water right for fish and wildlife purpose in Martin Lake, and as the USFS has used water within Martin Lake for the purpose of providing water for wildlife in the area and to maintain a westslope cutthroat fishery within Martin Lake, the USFS has confirmed its prima facie claim for a use right appropriation for fish and wildlife purpose in Martin Lake. The "no right" issue remark should be stricken as addressed and resolved.

18. The Temporary Preliminary Decree states that the purpose is fish and wildlife as claimed. At hearing the United States of America requested that the purpose (use) be amended to include recreation. At the time of the hearing, an incidental use remark could be added to the purpose (use) stated on the abstract of claim to note incidental use for another purpose. Rule 6(b)(4), W.R.C.E.R. now limits incidental use remarks to only one purpose, fire protection. Therefore, an incidental use remark concerning recreation cannot be added to the purpose of this claimed right. The claim as filed only identifies fish and wildlife as the purpose, so an implied claim for recreation is not possible. The purpose should remain fish and wildlife.

19. The Temporary Preliminary Decree does not include a flow rate. As specified by Rule 29(c), W.R.C.E.R., the flow rate should be unquantified. The following remark should be added to the flow rate entry on the abstract of claim: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS INLAKE USE.

20. The Temporary Preliminary Decree does not include a volume. The volume claimed is 1.00 acre foot per year. As specified by Rule 29(c)(1)(ii)(A), W.R.C.E.R., the volume should be 1.00 acre foot.

21. The Temporary Preliminary Decree does not include a means of diversion. The means of diversion should be INLAKE.

22. On December 11, 2008 Chief Water Judge C. Bruce Loble issued the Amended Order on Period of Diversion - Statewide which requires the addition of the "period of diversion" to the abstract of every claim in the statewide adjudication. This claim did not include a period of diversion when it appeared in the Temporary Preliminary Decree. Although water is not diverted in this instance, abstracts for instream and inlake claims still have a period of diversion printed on them. For such claims, the period of diversion would be the same as the period of use. The Temporary Preliminary Decree states that the period of use is January 1 to December 31. Therefore, the period of diversion should be January 1 to December 31.

#### CONCLUSIONS OF LAW

1. The Montana Water Court has jurisdiction to review all objections to temporary preliminary decrees pursuant to section 85-2-233, MCA.
2. 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. Section 3-7-224, MCA.
3. An existing water right is a "right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes non-Indian and Indian reserved water rights created under federal law and water rights created under state law." Section 85-2-102 (8), MCA.
4. Judicial notice is taken that the USFS did not file an objection to the Perkins claim. Rule 202(b)(6), Mont.R.Evid.
5. Claim 76G 50653-00 specifies that this claimed water right is a use right based upon Montana law. This claimed water right is not claimed as a reserved right water right or claimed as a water right based upon federal law. Therefore, Montana statutory and case law govern the adjudication of this claimed water right.
6. A properly filed statement of claim for existing water right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves an element of the prima facie claim is incorrect.

Rule 19, W.R.Adj.R.

7. No evidence was entered into the record to contradict and overcome the prima facie claim concerning the ownership or priority date.

8. Using water for fish and wildlife purposes is a beneficial use of water. *Matter of Dearborn Drainage Area*, 234 Mont. 331, 339, 766 P.2d 228 (1988) [*Bean Lake I* decision] and *Matter of the Adjudication of Existing Rights*, 2002 MT 216, [*Bean Lake III* decision].

9. The decision in *Bean Lake III* overrules the central conclusion in *Bean Lake I* that although fish and wildlife purpose is a beneficial use no valid water rights were recognized for recreation, wildlife, or fish and wildlife purposes prior to July 1, 1973 citing the same prior Montana Supreme Court decisions cited in the USFS Supplemental Brief.

The *Bean Lake III* decision states:

For the foregoing reasons, we overrule the *Bean Lake* conclusion that Montana, prior to 1973, did not recognize fish, wildlife and recreation appropriations of water, whether diversionary or non-diversionary. We hold that Montana recognized fish, wildlife and recreation uses as beneficial and that valid instream and inlake appropriations of water existed in Montana prior to 1973 where the intended beneficial use did not require diversion, and when the facts and circumstances indicate that notice of the appropriator's intent had been given.

In its brief to this Court, the Water Court requested that, if this Court revisits the *Bean Lake* decision, we give the Water Court "clear instructions" on how to proceed with regard to recreation, fish and wildlife claims. Accordingly, the Water Court is instructed to identify, review and hold hearings in a manner similar to *Adjudication of Water Rights of Yellowstone River* (1992), 253 Mont. 167, 832 P.2d 1210, on all pre-1973 recreation, fish and wildlife claims, both diversionary and non-diversionary, and determine the validity of such claims under the holding herein.

*Id.* at ¶ 40-41. There no longer is an issue about the validity of the claimed right just because the purpose is fish and wildlife. However, the decision states that a hearing must be held to determine the validity of the claimed appropriation for such purpose, whether diverted, instream, or inlake. The Montana Supreme Court revised this direction through the 2006 revision of the Water Right Claim Examination Rules by stating that a hearing to determine the validity of the claimed right only needs to be held if there is an issue remark

added during examination, or a valid objection filed to the claim, or if the claim is called in on motion of the Montana Water Court. Rule 27(h)(5), W.R.C.E.R. In this instance, the hearing of the Perkins objection to the validity of this claimed right was held prior to the Montana Supreme Court direction that a hearing must be held when an objection is filed, and the record of that hearing provides the information needed to determine if a valid appropriation was made by the USFS.

10. A valid appropriation of a use right prior to July 1, 1973 required 1) an intent to appropriate a water right, 2) an actual diversion, impoundment or withdrawal of water, and 3) beneficial use of the water diverted, impounded, or withdrawn. *See Murray v. Tingley*, 20 Mont. 260 (1897), *Power v. Switzer*, 21 Mont. 523 (1898), *Bailey v. Tintinger*, 45 Mont. 155 (1912), and *Wheat v. Cameron*, 64 Mont. 494 (1922). In 2002 the Montana Supreme Court held that a diversion, impoundment or withdrawal is not necessary for certain types of beneficial uses. *Bean Lake III*, 2002 MT 216, ¶ 32.

11. The *Bean Lake III* decision noted that claims for instream or inlake use rights obviously do not have a physical diversion structure or mechanism in place which provides notice to the world of the appropriator's intent to appropriate a water right by such structure or mechanism. The decision provides the following guidance - albeit limited - to determine intent for non-diversionary claimed rights:

Under prior appropriation, a diversion traditionally served dual purposes -- providing notice of a user's intent to appropriate water, and defining the extent of the use. In *Wheat v. Cameron* (1922), 64 Mont. 494, 210 P. 761, this Court explained that intent to appropriate is to be determined from the specific facts and circumstances pertaining.

It is argued by defendants' learned counsel that no intent to make an appropriation from Mill Creek on the part of [plaintiffs' predecessors] is shown, and therefore the adjudication is not warranted. . . . Intent to appropriate will be *presumed from these facts*, showing, as they do, diversion and use of Mill Creek waters for irrigating purpose. *A claimant's intent at the time of appropriation must be determined by his act and by surrounding circumstances*, its actual and contemplated use, and the purpose thereof. (*Toohey v. Campbell*, 24 Mont. 13, 60 Pac. 396). Actual diversion and beneficial use existing or in contemplation constitute an appropriation [citations omitted], and *from this evidence* it is plain that water from Mill Creek was in

fact appropriated in the spring of 1867 by [plaintiffs' predecessors], as found by the court. And the change in the point of diversion or place of use did not affect the appropriation.

*Wheat*, 64 Mont. at 501, 210 P. at 763(emphasis added).

In accordance with the historical flexibility of the doctrine of prior appropriation, the *Wheat* Court held that although intent could be *presumed* from actual diversion, intent could be proven through other facts and surrounding circumstances. Similarly, in *Bean Lake*, the Court noted that diversion could provide notice or proof of an intent to appropriate. *Bean Lake*, 234 Mont. at 339, 766 P.2d at 233. These decisions do not require a diversion for proof of intent. To the contrary, the opinions suggest that although a diversion may provide proof, intent is the essential element and may be proven through means other than a diversion.

*Bean Lake III*, ¶¶ 22 and 23. The guidance: intent may be proved by "other facts and surrounding circumstances".

The next paragraph in the *Bean Lake III* cites two examples of non-diversionary appropriations but this characterization is inaccurate. The onstream reservoirs in *Donich v. Johnson* (1926), 77 Mont. 229, 250 P. 963 include dams, physical structures which impound the water. The water right at issue in *Axtell v. M.S. Consulting*, 1998 MT 64, 288 Mont. 150, 955 P.2d 1362, was diverted by bucket - although small and laborious, the bucket was a physical withdrawal of the water from the source. The *Bean Lake III* decision also notes non-diversionary uses such as floating logs or livestock drinking direct from the source. The implication is that such observable actions and uses are sufficient "other facts and surrounding circumstances" which prove an intent to appropriate.

The substantive *Bean Lake III* decision closes with the following:

We hold that Montana recognized fish, wildlife and recreation uses as beneficial and that valid instream and inlake appropriations of water existed in Montana prior to 1973 where the intended beneficial use did not require diversion, *and when the facts and circumstances indicate that notice of the appropriator's intent had been given.*

*Bean Lake III*, ¶ 40. (Emphasis added.)

12. The USFS management activities to maintain the character of Martin Lake as a remote mountain lake fishing and camping destination promoted in its recreation guide and



its management activities to monitor and maintain the westslope cutthroat trout fishery in Martin Lake for the fishing public, are sufficient "other facts and surrounding circumstances" to prove the USFS intent to appropriate water within Martin Lake for fish and wildlife purpose as well as notice of such intent to appropriate water in Martin Lake for fish and wildlife use.

13. As Perkins did not present sufficient evidence to contradict and overcome the purpose or validity of this claimed appropriation and as the USFS presented additional evidence confirming its intent to appropriate, notice of its intention to appropriate, and actual beneficial use of water within Martin Lake for fish and wildlife purpose, the USFS prima facie status of this claimed appropriation remains intact.

14. Lest there be any uncertainty, the above legal conclusion is based upon the application of Montana law to a claim for a water right which is based upon Montana law. Although the claimant is the USFS, the legal basis claimed for 76G 50563-00 is a use right grounded in Montana law, not federal law. Whether the USFS has a valid existing reserved water right for Martin Lake under federal law is not before this Court in this proceeding.

15. Rule 6(b)(4), W.R.C.E.R. now limits incidental use remarks to only one purpose, fire protection.

16. "'Implied Claim' means a claim authorized by the water court to be separated and individually identified when a statement of claim includes multiple rights." Rule 2(a)(33), W.R.C.E.R. The Statement of Claim form is reviewed to determine if a single water right or multiple water rights have been claimed on that single Statement of Claim form. The attachments to the Statement of Claim may also be reviewed as they provide evidentiary support for the right(s) claimed on the claim form. When the review confirms that the Statement of Claim does actually contain multiple water rights, the corpus of the water claimed is divided into the constituent rights - the claimed volume or the claimed volume and flow rate are apportioned for each right. A Statement of Claim cannot be amended after it has been filed to add other water rights which the claimant failed to claim. Order Amending and Adopting Master's Report, Case 40A-115 (for claim 40A-W-151882-00), filed April 14, 2004. In this instance, the USFS claim form includes no

reference to recreation and there are no attachments to the claim. There is no basis for generating an implied claim for recreation purpose.

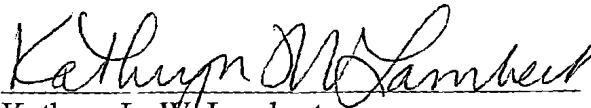
17. The flow rate and volume of inlake lake claims for fish and wildlife purpose are governed by Rule 29(c), W.R.C.E.R. Supplemental Order Regarding Fish and Wildlife, Wildlife, And Recreation Claims - Statewide 2013, issued April 17, 2013. Rule 29(c)(1), W.R.C.E.R. states that the flow rate will not be quantified and that a remark stating that the flow rate is not quantified is added to the flow rate entry on the abstract of claim. Rule 29(c)(1)(ii)(A), W.R.C.E.R. states that the volume will be quantified and if the "claimed volume is less than 15.00 acre-feet, it will generally be accepted as claimed."

18. A period of diversion is added to the abstract of claim for every existing water right. Amended Order On Period of Diversion - Statewide, issued December 11, 2008.

#### RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Temporary Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

DATED this 4 day of June, 2015.

  
Kathryn L. Lambert  
Senior Water Master

Jody Miller, Special Assistant  
United States Attorney  
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**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
CLARK FORK RIVER ABOVE BLACKFOOT RIVER  
BASIN 76G  
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:** 76G 50653-00 STATEMENT OF CLAIM

**Version:** 2 -- POST DECREE

**Status:** ACTIVE

**Owners:** USA (DEPT OF AGRICULTURE FOREST SERVICE)  
% JED SIMON  
PO BOX 7669  
MISSOULA, MT 59807 7669

**Priority Date:** AUGUST 26, 1911

**Type of Historical Right:** USE

**Purpose (use):** FISH AND WILDLIFE

**\*Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS INLAKE USE.

**\*Volume:** 1.00 AC-FT

**Source Name:** MARTIN LAKE

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWSWSW	16	7N	11W	POWELL

**\*Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** INLAKE

**Period of Use:** JANUARY 1 TO DECEMBER 31

**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			NWSWSW	16	7N	11W	POWELL