

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270
(406) 586-4364
watercourt@mt.gov

ELECTRONICALLY FILED

40K-0208-R-2022

August 17, 2022

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
WHITEWATER CREEK - BASIN (40K)
PRELIMINARY DECREE

CLAIMANT: USA (Dept. of Interior Bureau of Land Mgmt.)

CASE 40K-0208-R-2022

40K 73224-00

40K 73226-00

40K 73228-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's 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. If you file an objection, you must serve 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

The above-captioned claims appeared in the Preliminary Decree for Whitewater Creek (Basin 40K) issued on March 7, 2019. The claims are owned by the United States

Department of Interior, Bureau of Land Management (BLM). All claims received issue remarks during the DNRC's claims reexamination.

The claims were consolidated into Case 40K-0208-R-2022 to resolve the issue remarks.

FINDINGS OF FACT

1. Claims 40K 73224-00, 40K 73226-00 and 40K 73228-00 received the following substantive issue remark:

AN AMENDMENT WAS SUBMITTED ON 03/26/2018 REQUESTING TO AMEND THE MEANS OF CONVEYANCE, PRIORITY DATE, AND TYPE OF RIGHT. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

Each of the claims also received the following substantive issue remark:

THE CLAIM IS BASED ON PUBLIC WATER RESERVE NO. 107 CREATED BY EXECUTIVE ORDER DATED APRIL 17, 1926. IT IS NOT CLEAR IF THIS CLAIMED RIGHT IS A FEDERAL RESERVED WATER RIGHT, BUT IF IT IS, IT IS NOT CLEAR WHETHER THE PURPOSE CLAIMED WAS CONTEMPLATED BY SUCH A RESERVATION, OR IF THE AMOUNT OF WATER CLAIMED IS THE AMOUNT NECESSARY TO FULFILL THE PURPOSE OF THE RESERVATION.

2. The amendment submitted to the DNRC requests that the priority date and type of historical right be modified as follows:

Priority Date:	April 17, 1926	<u>July 11, 1935</u>
Type of Historical Right:	Reserved	<u>Use</u>

3. On April 25, 2022, the Court consolidated the claims and set a filing deadline for BLM to file any additional information or evidence supporting or clarifying the requested amendments.

4. On June 2, 2022, BLM filed a *Response* reiterating the requested amendments to the above-listed elements. This filing supports the modifications requested in BLM's amendment.

5. Each claim also received an issue remark from the DNRC stating that:

SOURCE NAME WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

6. The issue remarks identify elements modified as a result of DNRC review pursuant to Montana Water Court reexamination orders. The remarks indicate that if no objections are filed, the elements of the claim will remain as they appear on the abstract and the remarks will be removed. None of the claims received objections to the elements noticed.

7. All of the claims also received the following notice-type issue remark:

THIS CLAIM WAS NOT INCLUDED IN THE BASIN 40K TEMPORARY PRELIMINARY DECREE ISSUED NOVEMBER 21, 1989.

8. This remark served its notice purpose.

PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.

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

3. 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.

4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

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. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

CONCLUSIONS OF LAW

1. BLM showed by a preponderance of the evidence that the priority date and type of historical right for each claim in this matter should be amended as described in Finding of Fact No. 2. These modifications resolve the amendment and type of right issue remarks on each claim. The remarks should be removed.

2. Each remark in Finding of Fact No. 5 provides notice of the changes made after completion of the Temporary Preliminary Decree proceedings and prior to issuance of the Preliminary Decree. The remarks do not raise unresolved issues that need to be addressed. No proceedings are required to resolve the remarks; the remarks should be removed from the abstracts.

3. The notice-type issue remark in Finding of Fact No. 7 served its notice purpose and should be removed from each claim.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

**Post decree abstracts of each water right claim
reflecting the recommended changes are
attached to this Report.**

Digitally signed
by Eugene
White
Date:
2022.08.16
17:02:05 -06'00'

Eugene C. White
Water Master

Service Via Electronic Mail:

USA (Dept. of Interior Bureau of Land Mgmt.)
5001 Southgate Dr.
Billings, MT 59101-4669
Mnorris@Blm.gov
MontanaBasins.Enrd@Usdoj.Gov
(Last Order)

**Mark Widerschein,
NRS-ENRD US DOJ
PO Box 7611
Washington, DC 20044-7611
202-532-5803
Mark.Widerschein@Usdoj.Gov
Montanabasins.ENRD@USDOJ.GOV**

Service List Updated: 8/17/2022

WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
WHITEWATER CREEK
BASIN 40K

Water Right Number: 40K 73224-00 RESERVED CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
5001 SOUTHGATE DR
BILLINGS, MT 59101 4669

Priority Date: JULY 11, 1935

Type of Historical Right: USE

Purpose (use): WILDLIFE

Flow Rate:

Volume: 1.09 AC-FT

Source Name UNNAMED TRIBUTARY OF INTERIOR DRAINAGE

Source Type: SURFACE WATER

POTHOLE LAKE

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		NWSESW	12	37N	30E	PHILLIPS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WILDLIFE DIRECT FROM SOURCE

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			NWSESW	12	37N	30E	PHILLIPS

WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
WHITEWATER CREEK
BASIN 40K

Water Right Number: 40K 73226-00 RESERVED CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
5001 SOUTHGATE DR
BILLINGS, MT 59101 4669

Priority Date: JULY 11, 1935

Type of Historical Right: USE

Purpose (use): WILDLIFE

Flow Rate:

Volume: 0.90 AC-FT

Source Name: UNNAMED TRIBUTARY OF INTERIOR DRAINAGE

Source Type: SURFACE WATER
POTHOLE LAKE

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		NESWSE	12	37N	30E	PHILLIPS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WILDLIFE DIRECT FROM SOURCE

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			NESWSE	12	37N	30E	PHILLIPS

WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
WHITEWATER CREEK
BASIN 40K

Water Right Number: 40K 73228-00 RESERVED CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
5001 SOUTHGATE DR
BILLINGS, MT 59101 4669

Priority Date: JULY 11, 1935

Type of Historical Right: USE

Purpose (use): WILDLIFE

Flow Rate:

Volume: 0.73 AC-FT

Source Name: UNNAMED TRIBUTARY OF INTERIOR DRAINAGE

Source Type: SURFACE WATER
POTHOLE LAKE

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		S2SESW	12	37N	30E	PHILLIPS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WILDLIFE DIRECT FROM SOURCE

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			S2SESW	12	37N	30E	PHILLIPS