

Montana Water Court
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FILED

02/29/2024

Sara Calkins
CLERK

Montana Water Court
STATE OF MONTANA

By: Julia Romero

40D-0223-R-2023

Nordlund, Julia

4.00

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
BIG DRY CREEK - BASIN (40D)
PRELIMINARY DECREE

CLAIMANT: Devlin Ranch Co.

CASE 40D-0223-R-2023
40D 174598-00

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

Claim 40D 174598-00 appeared in the Preliminary Decree for Big Dry Creek (Basin 40D). The claim received a Montana Department of Natural Resources and Conservation ("DNRC") issue remark. On September 28, 2023, the claim was consolidated into Water Court Case 40D-0223-R-2023 to resolve the issue remark.

FINDINGS OF FACT

1. Claim 40D 174598-00 is a stock claim from an onstream reservoir on an unnamed tributary of Whites Creek.

2. The claim received the following issue remark:

EXISTENCE OF THE CLAIMED RESERVOIR CANNOT BE CONFIRMED WITH THE AVAILABLE DATA.

3. The Court set a deadline for the Claimant to contact the DNRC to resolve the issue remark.

4. On December 14, 2023, the DNRC filed a memorandum with the Water Court.¹ The memorandum indicates that the Claimant did not contact the DNRC to confirm the location of the reservoir. Accordingly, the DNRC recommends that the legal land description for the location of the reservoir be modified to the NENWSE of Section 11 T13N, R46E to resolve the issue remark. Water Resources Survey photograph DIV-41J-170, dated August 25, 1968, and a USGS photograph from 1979 show a reservoir located in the NENWSE of Section 11, but not in the claimed location of the SENWSE of Section 11.

5. On January 4, 2024, the Court set a deadline for Claimant to show cause why the legal land description for the reservoir should not be modified to the NENWSE of Section 11 T13N, R46E to resolve the issue remark.

6. Nothing was filed.

7. As this is an onstream stock reservoir, the place of use should match the point of diversion and reservoir. The point of diversion, reservoir, and place of use for claim 40D 174598-00 are NENWSE of Section 11 T13N, R46E.

CONCLUSIONS OF LAW

1. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

¹ The DNRC's memorandum and all other case documents are viewable in the Water Court's FullCourt Enterprise case management system.

2. The degree or weight of evidence needed to contradict or overcome the prima facie proof statute is a preponderance of the evidence. *Burkhartsmeier et al. v. Burkhartsmeier et al.*, Case 40G-2, (MT Water Court Memorandum Opinion and Order Adopting Master’s Report, Mar. 11, 1997). The Montana Supreme Court has defined preponderance as “a relatively modest standard that the statutory criteria are ‘more probable than not’ to have been met.” *Hohenlohe v. State*, 2010 MT 203 ¶ 33, 357 Mont. 438, 240 P.3d 628.

3. The Montana Water Court is permitted to use information submitted by the Department of Natural Resources and Conservation, the statement of claim, information from approved compacts, and any other data obtained by the Court to evaluate water right claims. Section 85-2-231(2), MCA.

4. When resolving issue remarks, the Montana 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.

5. The evidence in the record supports the corrections outlined above and resolves the issue remark.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends the Court make the changes specified above.

A Post Decree Abstract of Water Right Claim is served with this Master’s Report to confirm the recommended corrections have been made in the state’s centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Devlin Ranch Co.
PO Box 186
Terry, MT 59349-0186

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BIG DRY CREEK
BASIN 40D**

Water Right Number: 40D 174598-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: DEVLIN RANCH CO
PO BOX 186
TERRY, MT 59349-0186

Priority Date: DECEMBER 31, 1957

Type of Historical Right: USE

Purpose (Use): STOCK

***Flow Rate:** NO FLOW RATE HAS BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCKWATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: UNNAMED TRIBUTARY OF WHITES CREEK

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		NENWSE	11	13N	46E	PRAIRIE

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

Diversion Means: DAM

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NENWSE	11	13N	46E	PRAIRIE

Diversion to Reservoir: DIVERSION # 1

Period of Use: APRIL 1 TO OCTOBER 1

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			NENWSE	11	13N	46E	PRAIRIE