

Montana Water Court  
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IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
BOULDER RIVER—TRIBUTARY OF THE JEFFERSON RIVER (BASIN 41E)  
PRELIMINARY DECREE

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CLAIMANTS: Tom Carey Cattle Co.; Dunn Canyon Cattle Co.

OBJECTORS: Tom Carey Cattle Co.; Dunn Canyon Cattle Co.

**CASE 41E-0174-R-2024**  
41E 94251-00

**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, conclusion 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 to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. 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 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**

Tom Carey Cattle Co. and Dunn Canyon Cattle Co. objected to Tom Carey Cattle Co. and Dunn Canyon Cattle Co. claim 41E 94251-00. Tom Carey Cattle Co. also filed a late objection to this claim during the Temporary Preliminary Decree proceedings. This claim appeared in the Preliminary Decree with the following notice remarks:

A LATE OBJECTION HAS BEEN FILED TO THE PRIORITY DATE OF THIS WATER RIGHT CLAIM. IT WILL BE RESOLVED DURING THE ADJUDICATION OF OBJECTIONS TO THE PRELIMINARY DECREE.

DITCH 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.

On March 8, 2024 the parties filed a Motion To Modify Preliminary Decree Of Water Right 41E 94251-00 To Resolve Objections And DNRC Issue Remarks [“Motion”]. The Motion is viewable in the Court’s FullCourt Enterprise case management system.

#### APPLICABLE LAW

Judicial notice is taken of prior proceedings for other claims based on the same notice of appropriation: Temporary Preliminary Decree Cases 41E-27 and 41E-37. Rule 202(b)(6), M.R.Evid.

A priority date represents the relative seniority of a particular right to others on the claimed source or hydrologic system. If the exact date of appropriation is unknown, a date which preserves that relative priority is the best that can be done.

The date of an appropriation appearing in a water right decree is material only in its relation to the question of priority. (*St. Onge v. Blakely*, 76 Mont. 1, 245 P. 532.) There is, therefore, no valid objection to the fixing of an arbitrary date of appropriation, and, if an incorrect date is given, the error is harmless unless the objecting claimant can show that his right antedates the date fixed for another instead of being subsequent thereto, as appears from the decree. (*Geary v. Harper*, 92 Mont. 242, 12 P. 2d 276; *McDonald v. Lannen*, 19 Mont. 78, 47 P. 648.)

*Vidal v. Kensler*, 100 Mont. 592, 594 (1935).

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, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

#### FINDINGS OF FACT

1. This claim is based on the John Stults and Con (?) Stults Notice of Water Right for an 1877 appropriation from the Boulder River. The Notice states: “said water was appropriated in

the year 1877 – in the months of July and August”. The Statement of Claim states the priority date is “July/Aug 1877”. During verification prior to issuance of the Temporary Preliminary Decree, the priority date was changed to specific date July 31, 1877. The Preliminary Decree states that the priority date is July 31, 1877.

2. Two other claims based on the same Notice of Water Right appeared in the Preliminary Decree with priority date July 1, 1877.

- Vincent J. Carey, Michael J. Carey, Franklin C. Carey, and Patrick E. Carey claim 41E 93903-00: the Statement of Claim states the priority date is July 1, 1877 and appeared in the Temporary Preliminary Decree with July 1, 1877 as the priority date. Priority date was objected to. The objections were settled. The Master’s Report states there is no change to the priority date. See Case 41E-27 Master’s Report filed 12-17-1993, Order Adopting Master’s Report entered 9-19-1994.

- John Carey Ranch Co. claim 41E 93994-00: the Statement of Claim states the priority date is July 1, 1877 and appeared in the Temporary Preliminary Decree with July 1, 1877 as the priority date. Priority date was objected to. The objections were settled. The Master’s Report states there is no change to the priority date. See Case 41E-37 Master’s Report filed 6-23-1995, Order Adopting Master’s Report entered 8-16-1995.

3. The priority date should be the same for all of the claims based on the same notice of appropriation. The priority date for claim 41E 94251-00 should be July 1, 1877.

4. The late objection and ditch name notice remarks should be removed as having served their notice purposes.

#### CONCLUSION OF LAW

The settlement filed by the parties is sufficient to contradict and overcome the prima facie claim.

#### RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court grant the Motion and make the changes specified in the Findings of Fact to correct the 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.

#### **ELECTRONICALLY SIGNED AND DATED BELOW**

**Service Via Electronic Mail:**

Jeremy A. Michael  
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**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**BOULDER RIVER, TRIBUTARY TO JEFFERSON RIVER**  
**BASIN 41E**

**Water Right Number:** 41E 94251-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**Owners:** CAREY, TOM CATTLE CO  
2120 MT HWY 69  
BOULDER, MT 59632-9730  
  
DUNN CANYON CATTLE CO  
CHRIS CAREY  
2300 MT HWY 69  
BOULDER, MT 59632-9732

**Priority Date:** JULY 1, 1877

**Type of Historical Right:** FILED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 1.71 CFS

**\*Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

**Climatic Area:** 4 - MODERATELY LOW

**Maximum Acres:** 45.00

**Source Name:** BOULDER RIVER

**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		SENENE	24	4N	3W	JEFFERSON

**Period of Diversion:** APRIL 15 TO OCTOBER 15

**Diversion Means:** HEADGATE

**Ditch Name:** CAREY-TWOHY DITCH

**Period of Use:** APRIL 15 TO OCTOBER 15

**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	25.00		NESW	30	4N	2W	JEFFERSON
2	20.00		SE	30	4N	2W	JEFFERSON
<b>Total:</b>	<u>45.00</u>						

**Remarks:**

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

93901-00	94249-00	94251-00	94252-00	94254-00	94256-00
94258-00	94259-00	94270-00			