

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

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
KOOTENAI RIVER BASIN (76D)
PRELIMINARY DECREE

CLAIMANTS: Rebecca J. McLaughlin; Elizabeth F. Smith;
Margaret M. Gibbons; Donald L. Gibbons

CASE 76D-0539-R-2023
76D 141381-00

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

Statement of the case

Domestic claim 76D 141381-00 appeared in the Preliminary Decree with the following issue remarks:

THE PLACE OF USE APPEARS TO NEED MODIFICATION BASED ON THE DNRC CORRECTION TO THE POINT OF DIVERSION. THE CORRECT PLACE OF USE LEGAL LAND DESCRIPTION APPEARS TO BE THE S2NENE SEC 15 TWP 30N RGE 31W LINCOLN COUNTY.

POINT OF DIVERSION 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.

Issue remarks result from Department of Natural Resources and Conservation ("DNRC") claims examination. Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim.

Montana law requires the Water Court to resolve issue remarks. An order set a filing deadline for claimants to file their agreement with the place of use issue remark or evidence supporting the historical place of use. Claimants failed to participate in the issue remark resolution process. The court order informed claimants that their lack of reply would be deemed their agreement to the suggested resolution of the issue remark. The court order also included the following language: "Failure to comply with this order may result in modification of your water right."

Issues

1. What is the historically accurate place of use for domestic claim 76D 141381-00?
2. Are the issue remarks resolved?

Finding of fact

A preponderance of evidence establishes the historically accurate place of use for domestic claim 76D 141381-00 is the S2NENE Section 15, Township 30 North, Range 31 West, Lincoln County.

Principles 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. A preponderance of the evidence is a “modest standard” and is evidence that demonstrates the fact to be proved is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 348, 240 P.3d 628.

2. 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.

3. 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.

4. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. Section 85-2-248(3), MCA.

5. All parties subject to the jurisdiction of the Montana Water Court in this adjudication have the obligation to comply with Orders of this Court, including Orders issued by a Master appointed by the Court. If a claimant fails to comply with an Order issued by the Court in its review of issue remarks, the Court may amend the claim to conform with information found in the claim file and information before the Court. Section 85-2-248(9)(a),(b), MCA.

Analysis

Issues 1 and 2 - historical place of use and issue remark resolution

Based upon a review of the record before the court, the statement of claim identified the point of diversion as Lot 5 of Garren Tracts Subdivision and the place of use as Lots 4 and 5 of Garren Tracts Subdivision. A May 8, 2008 letter from the Water Court prompted by a fee appeal for the claim states that the Garren Tracts Subdivision appears to be located in the NE of Section 15, Township 30 North, Range 31 West, Lincoln County, not the SE of Section 15, Township 30 North, Range 31 West, Lincoln County identified by the statement of claim and decree abstract. It appears DNRC agreed. During claims reexamination, DNRC modified the point of diversion legal land description for claim 76D 141381-00 and noted the modification with an issue remark. DNRC also added an issue remark suggesting a modified place of use legal land description.

Based upon this information and pursuant to § 85-2-248(3), MCA, claimants were ordered to file a statement with the court agreeing with the suggested modified place of

use legal land description or to file evidence establishing the historical place of use. Claimants failed to file a statement or evidence by the deadline.

Claimants’ failure to provide any evidence to address or resolve the place of use issue remark leaves the information in the claim file and the issue remark concerning place of use as strong evidence of the historically accurate place of use.

The point of diversion issue remark notified water users that the point of diversion was modified by DNRC during claims reexamination. The issue remark instructed claimants and other water users that if no objections were filed to the point of diversion, the element would remain as it appears on the Preliminary Decree abstract. No one objected to the point of diversion.

Conclusions of law

Based on information in the claim file and before the court, and the claimants’ failure to comply with an order issued by the Water Master, domestic claim 76D 141381-00 should be amended as recommended by the order setting filing deadline. The place of use issue remark is resolved.

The point of diversion issue remark served its notice purpose.

Recommendations

Based upon the foregoing, claim 76D 141381-00 should be amended as follows to accurately reflect historical use.

PLACE OF USE:

<u>ACRES</u>	<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
0.25	S2NENE	NENESE	15	30N	31W	LINCOLN
Subdivision: GARREN TRACTS TRACT/LOT: 004						
0.25	S2NENE	NENESE	15	30N	31W	LINCOLN
Subdivision: GARREN TRACTS TRACT/LOT: 005						
TOTAL: 0.50						

The issue remarks appearing on the claim abstract should be removed.

A Post Decree Abstract of Water Right Claim accompanies this report to confirm implementation of the recommendations in the state's centralized water right record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail

Rebecca J McLaughlin
Elizabeth F Smith
34437 US Hwy 2
Libby MT 59923-8446

Donald L Gibbons
Margaret M Gibbons
PO Box 362
Libby MT 59923

\\JUDHLNSRV-DATA\Share\JUDGALH2OSRV (Datavol)\Share\WC-BASIN FOLDERS\76D PD\76D Cases\76D-0539-R-2023\MR--76D-539R sjs.docx

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D**

Water Right Number: 76D 141381-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: DONALD L GIBBONS
PO BOX 362
LIBBY, MT 59923

MARGARET M GIBBONS
PO BOX 362
LIBBY, MT 59923

REBECCA J MCLAUGHLIN
34437 US HWY 2
LIBBY, MT 59923-8446

ELIZABETH F SMITH
34437 US HWY 2
LIBBY, MT 59923-8446

Priority Date: SEPTEMBER 6, 1960

Type of Historical Right: USE

Purpose (Use): DOMESTIC

Flow Rate: 15.00 GPM

Volume: 1.50 AC-FT

Households: 2

Maximum Acres: 0.50

Source Name: GROUNDWATER

Source Type: GROUNDWATER

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		SWNE	15	30N	31W	LINCOLN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

Subdivision: GARREN TRACTS TRACT/LOT: 005

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	0.25		S2NE	15	30N	31W	LINCOLN

Subdivision: GARREN TRACTS TRACT/LOT: 004

2	0.25		S2NE	15	30N	31W	LINCOLN
---	------	--	------	----	-----	-----	---------

Subdivision: _____ GARREN TRACTS TRACT/LOT: 005
Total: 0.50