

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

CLAIMANT: Louis L. Burrell

CASE 76D-0602-R-2024
76D 134847-00

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 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

Fish and wildlife claim 76D 134847-00 appeared in the Preliminary Decree with the following issue remarks.

WHEN THIS CLAIM WAS ORIGINALLY DECREED, THE PERIOD OF DIVERSION WAS NOT INCLUDED AS AN ELEMENT OF THE CLAIM. IN 2008, THE PERIOD OF DIVERSION ELEMENT WAS ADDED TO ALL CLAIM ABSTRACTS. IT IS NOT CERTAIN IF THE PERIOD OF DIVERSION DATES ADDED TO THIS CLAIM ACCURATELY REFLECT THE HISTORICAL PERIOD OF DIVERSION. MORE INFORMATION IS REQUIRED. CLAIMED VOLUME EXCEEDS CAPACITY OF RESERVOIR PLUS EVAPORATIVE LOSSES.

THE CLAIMED VOLUME CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE VOLUME WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

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

No objections were filed to the claim. Montana law requires the Water Court to resolve issue remarks.

Issue

Are the issue remarks resolved?

Finding of fact

The Preliminary Decree abstract for fish and wildlife claim 76D 134847-00 identifies its historically accurate elements.

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. Prima facie proof may be 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.

Analysis

The incorrect period of diversion issue remark appeared on the claim due to a DNRC claims examination error. On November 14, 2014, the court issued its Second Amended Order on Period of Diversion-Statewide. The order provided DNRC direction on how to examine period of diversion across the State of Montana. If the claim identified a reservoir capacity greater than 15.00 AF, as does fish and wildlife claim 76D 134847-00, the order instructed DNRC to contact the claimant to determine the period of diversion. If claimant failed to provide the period of diversion information to DNRC, the order instructed DNRC to add a period of diversion that matched the period of use and to add an issue remark stating that if no objections were filed to the period of diversion, it would be decreed as shown by the abstract, and the issue remark would be removed from the claim. DNRC partially followed the order by adding a year-round period of diversion that matched the year-round period of use but added the incorrect period of diversion issue remark.

The issue remark noting the volume identified by the claim was excessive

instructed claimant and other water users that if no objections were filed to the volume, the volume would remain as it appears on the Preliminary Decree abstract.

While the Basin 76D Preliminary Decree included the abstract of the claim, the Basin 76D objection list did not include the claim. If the objection list had included the claim, and if DNRC had completed the claims examination correctly, the claim would have appeared on the objection list with the following notation:

DNRC Examination Report Issues: NOTICE ONLY

The objection list failed to provide water users notice of the notice only issues concerning the claim. However, no further notice of fish and wildlife claim 76D 134847-00 is necessary. Together, the statement of claim and the notice of appropriation included with and in support of the statement of claim, identify the claim as an instream use for “fish culture,” a nonconsumptive use. Because the claim does not consume water, instead recycling the water back into the source, the year-round period of diversion and the quantified volume have no substantive effect on the source.

Conclusions of law

The issue remarks and the information resulting in the issue remarks do not raise issues requiring resolution.

Recommendations

The elements of fish and wildlife claim 76D 134847-00 accurately reflect historical use. No changes to the elements of the claim should be made.

The issue remarks should be removed from the claim abstract.

A Post Decree Abstract of Water Right Claim accompanies this report to confirm removal of the issue remarks in the state’s centralized water right record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail

Louis L Burrell
227 Burrell Dr
Libby MT 59923-9752

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

Water Right Number: 76D 134847-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: SEVERED

Owners: LOUIS L BURRELL
227 BURRELL DR
LIBBY, MT 59923-9752

Priority Date: APRIL 23, 1951

Type of Historical Right: FILED

Purpose (Use): FISH AND WILDLIFE

Flow Rate: 2.00 CFS

Volume: 1,448.00 AC-FT

Source Name: SPRING, UNNAMED TRIBUTARY OF BOBTAIL CREEK
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		SWSWNE	17	31N	31W	LINCOLN

Period of Diversion: JANUARY 1 TO DECEMBER 31
Diversion Means: DITCH
Reservoir: OFFSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SWNE	17	31N	31W	LINCOLN

Diversion to Reservoir: DIVERSION # 1

Reservoir: OFFSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NWSE	17	31N	31W	LINCOLN

Diversion to Reservoir: DIVERSION # 1

Reservoir: OFFSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SESW	17	31N	31W	LINCOLN

Diversion to Reservoir: DIVERSION # 1

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			SWNE	17	31N	31W	LINCOLN
2			NWSE	17	31N	31W	LINCOLN
3			SESW	17	31N	31W	LINCOLN

THIS WATER RIGHT HAS BEEN SEVERED FROM THE PLACE OF USE. CONTINUED USE OF THIS WATER RIGHT IN ACCORD WITH HISTORICAL PRACTICES IS ALLOWED. YOU MUST CONTACT DNRC AND OBTAIN A CHANGE AUTHORIZATION PRIOR TO CHANGING THE PLACE OF USE OF THIS WATER RIGHT.