

Montana Water Court  
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**FILED**

JUN 25 2020

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
MAINSTEM BITTERROOT RIVER AND EAST SIDE SUBBASIN – BASIN 76HA

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CLAIMANTS: K & J Development Inc.; Daly Ditches Irrigation District

OBJECTORS: Daly Ditches Irrigation District; United States of America (Fish and Wildlife Service)

NOTICE OF INTENT TO APPEAR: United States of America (Fish and Wildlife Service)

**CASE 76HA-289**

76H 103405 00  
76H 119837 00  
76H 119842 00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Clerk of the Montana Water Court. Please review this Report carefully.

You may file a written objection to this Master's Report if you disagree or find errors with the Master's Findings of Fact, Conclusions of Law, or Recommendations. The above stamped date indicates the date this Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules requires written objections to a Master's Report be filed within 10 days of the date of the Master's Report. Because this Master's Report was mailed to you, Rule 6(d) of the Montana Rules of Civil Procedure provides an additional 3 days to the 10-day objection period.

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 this 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

### FINDINGS OF FACT

1. Claims 76H 103405-00, 76H 119837-00, and 76H 119842-00 were decreed with a DNRC issue remark:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 6000 MINER'S INCHES DECREED IN CASE NO. 1287, RAVALLI COUNTY. 103405-00, 119837-00, 119842-00.

2. The decree exceeded issue remark in appearing on the claims in Case 76HA-289 reflects that the claims all claimed the Ravalli Land and Irrigation Company June 1, 1885 right from the Bitterroot River for 6,000 miner's inches, as follows:

- **6/1/1885 for 6000 MI**
  - 76H 103405-00: 260.30 gpm = 23.20 MI
  - 76H 119837-00: 150 cfs = 6000 MI
  - 76H 119842-00: stock

Together, the claims overclaimed the historical right by 23.20 miner's inches (260.30 gallons per minute (gpm)).

3. Daly Ditches Irrigation District objected to claims 76H 103405-00, 76H 119837-00, and 76H 119842-00. United States of America (Fish and Wildlife Service) objected to claim 76H 103405-00 and filed Notices of Intent to Appear for claims 76H 119837-00 and 76H 119842-00.

4. Claims 76H 103405-00, 76H 119837-00, and 76H 119842-00 were consolidated into Case 76HA-289.

5. On January 29, 2020, the parties filed a Stipulation resolving the Objections and Notice of Intent to Appear concerns and addressing the decree exceeded issue remark. The Stipulation proposes the following changes to the claims in this Case:

**Claim 76H 103405-00:**

Priority Date: JUNE 1, 1885 SEPTEMBER 5, 1912  
Type of Historical Right: ~~DECREED~~ USE

ADD UNDER POD, PLEASE:

USE OF THE REPUBLICAN DITCH TO DIVERT WATER UNDER THIS RIGHT IS UNDER THE TERMS AND CONDITIONS OF A PRIVATE WATER TRANSPORTATION AGREEMENT. A COPY OF THE AGREEMENT IS AVAILABLE AT THE DALY DITCHES IRRIGATION DISTRICT OFFICE. NO WATER UNDER THIS RIGHT CAN BE DIVERTED INTO OR CONVEYED THROUGH THE REPUBLICAN DITCH WITHOUT THE EXPRESS PERMISSION AND AGREEMENT BY DALY DITCHES IRRIGATION DISTRICT.

**Claim 76H 119837-00:**

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWSENE	25	5N	21W	RAVALLI

**Period of Diversion:** APRIL 1 TO OCTOBER 31

**Diversion Means:** HEADGATE

**Ditch Name:** REPUBLICAN DITCH

2 - SECONDARY SESENW 11 4N 21W RAVALLI

**Period of Diversion:** APRIL 1 TO OCTOBER 31

**Diversion Means:** HEADGATE

**Ditch Name:** HEDGE DITCH

WATER DIVERTED FROM THE BITTERROOT RIVER IS CONVEYED TO THE REPUBLICAN DITCH WHICH IS USED AS A NATURAL CARRIER TO A SECONDARY POINT OF DIVERSION IN THE SESENW SEC 11 TWP 4N RGE 21W RAVALLI COUNTY.

**Claim 76H 119842-00:**

No changes.

6. The proposed priority date and type of historical right changes to claim 76H 103405-00 were not supported by evidence. An Order Setting Filing Deadline was issued for the parties to provide evidence supporting the changes.

7. On February 27, 2020, K & J Development Inc. filed a document titled Filing Supporting Evidence for Claim 76H 103405-00.

8. The February 27, 2020 filing explained the rationale for the parties determining the stipulation priority date for claim 76H 103405-00 but did not provide any evidence supporting the priority date. Another deadline was set for the parties to file evidence supporting changing claim 76H 103405-00 to a September 5, 1912 use right.

9. On March 24, 2020, John Horat filed a Request for Clarification as to the type of evidence and documentation this Master is seeking regarding the change of type of right and priority date "in light of similar rulings in other cases."

10. On April 6, 2020, an Order on Status of Case, Order Vacating Previous Deadline, and Order Setting New Filing Deadline was Issued. The Order explained:

Pursuant to Section 85-2-227, MCA, a properly filed Statement of Claim is prima facie proof of its content. Section 85-2-227, MCA. The proposed priority date and type of right changes for claim 76H 103405-00 suggest the claim is no longer prima facie proof, and evidence supporting the changes needs to be filed.

Another deadline was set for the parties file evidence supporting changing claim 76H 103405-00 to a September 5, 1912 use right.

11. On May 29, 2020, representative of Claimant K & J Development Inc., John Horat, filed a response stating:

Unfortunately, K& J Development has been unable to find any other supporting evidence other than the Ravalli County Water Resources Survey field notes that identify “free water”. The field notes and associated maps were previously provided to the Court. The field notes are dated August 25, 1957.

...

Due to the inability to locate any supporting evidence other than the Water Resources Survey and Daly Ditches acknowledgement that it convey this water, K & J Developments would accept an August 8, 1957 priority date if that would address and resolve the Courts’ concerns.

#### CONCLUSIONS OF LAW

1. The Water Court is required to address all issue remarks that appear on a claim as well as any objections the claim receives. Sections 85-2-233, 85-2-247, and 85-2-248, MCA.

2. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie validity may be overcome by evidence showing that one or more elements of the claim are incorrect. This standard of proof applies to objectors or claimants objecting to their own water right claims. Rule 19, W.R.Adj.R., *Nelson v. Brooks*, 2014 MT 120; 375 Mont.86, 95; 329 P.3d 558, 564.

#### RECOMMENDATIONS

1. As Claimant K & J Development Inc. did not substantiate the proposed August 8, 1957 priority date (see Finding of Fact No. 11), claim 76H 103405-00 should be changed to an August 25, 1957 use right, consistent with the “free water” described in

the Ravalli County Water Resources Survey Field Notes. The information remark described in Finding of Fact No. 5 should be added to claim 76H 103405-00.

2. The changes shown in Finding of Fact No. 5 should be made to claim 76H 119837-00.

3. The issue remarks should be removed from claims 76H 103405-00, 76H 119837-00, and 76H 119842-00.

Post Decree Abstracts of Water Right Claim are served with the Report to confirm that the recommended changes have been made in the DNRC's water rights database.

DATED this 25<sup>th</sup> day of June, 2020.

 Digitally signed  
by Anika Stern

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Anika M. Stern  
Senior Water Master

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