

Montana Water Court  
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39E-0139-P-2022

November 9, 2022

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
YELLOWSTONE DIVISION  
BOX ELDER CREEK BASIN (39E)  
PRELIMINARY DECREE

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CLAIMANTS: Stephen M. Kalbach; Phillip A. Kalbach;  
Michael A. Kalbach

CASE 39E-0139-P-2022  
39E 13932-00  
39E 30139041

**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

### FINDINGS OF FACT

1. Stephen M. Kalbach, Phillip A. Kalbach, and Michael A. Kalbach are the record owners of claims 39E 13932-00 and 39E 30139041.

2. Claims 39E 13932-00 and 39E 30139041 were decreed with DNRC issue remarks; all issue remarks must be addressed.

3. The following issue remarks were decreed on claim 39E 13932-00:

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.

RESERVOIR RECORD 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.

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 19.8 TIMES THE CAPACITY OF THE RESERVOIR.

4. Claim 39E 13932-00 was decreed with a May 1 to September 1 period of diversion, matching the period of use. The DNRC was uncertain if the appointed period of diversion is accurate and indicated more information is required.

5. The reservoir issue remark decreed on claim 39E 13932-00 is a notice-type remark and does not require further attention.

6. Claim 39E 13932-00 is a water-spreading irrigation claim. Water-spreading systems divert and use water based on the natural availability of water, not the availability of water controlled or stored by a structure. Claim 39E 13932-00 was decreed with an excessive volume issue remark based upon the inadequate capacity of the reservoir to store and release the claimed volume. The excessive volume issue remark ignores the fact that such a system does not use the water stored in the reservoir but the water that *exceeds* the storage capacity of the reservoir. The storage capacity of the reservoir is not the correct guideline or limitation for determining the reasonableness of the claimed volume. Based on the guideline and the maximum acres irrigated, the 55.50 AC-FT volume is not excessive

7. Claim 39E 30139041 was decreed with the following DNRC issue remarks:

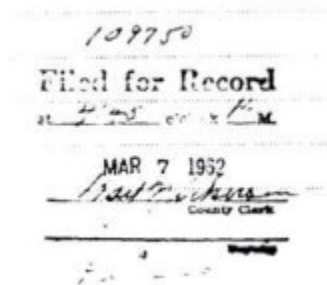
THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 39E DECREE ISSUED 02/01/1985.

THE PRIORITY DATE MAY BE QUESTIONABLE. A GW1 FORM WAS FILED ON 03/07/1962 AFTER THE CLAIMED PRIORITY DATE. NO FILING DATE WAS FOUND FOR THE GW2 FORM THAT WAS ATTACHED TO THE CLAIM. A GW4 FORM THAT APPEARS TO DESCRIBE THE SAME WELL WAS FILED ON 12/30/1963. SEE THE CLAIM FILE FOR DETAILS.

NO VOLUME HAS BEEN CLAIMED. THE VOLUME GUIDELINE FOR THIS PURPOSE IS 9.0 ACRE-FEET PER YEAR.

8. The first issue remark decreed on claim 39E 30139041 is a notice-type remark and does not require further attention.

9. The second remark indicates a DNRC claims examiner had questions regarding the priority date for claim 39E 30139041. Upon further review of the record, this Master has confirmed the Notice of Completion of Groundwater Appropriation by Means of Well (GW2 Form) was filed for record on March 7, 1962.



During the examination of the claim, the DNRC examiner obtained a copy of a Declaration of Vested Groundwater Rights for the well (GW4 Form) filed on December 30, 1963. The issue remark that was added to the claim also referred to a GW1 Form; this Master was unable to find the referenced form. Pursuant to Rule 13(f)(4), W.R.C.E.R., it appears the priority date for claim 39E 30139041 should be modified from January 28, 1962 to March 7, 1962, the date the GW2 form was filed.

10. The volume remark decreed on claim 39E 30139041 indicates that no volume was claimed. A review of the claim form confirms the volume elements was left blank:

10. VOLUME: \_\_\_\_\_ acre-feet per year

The DNRC volume guideline for this claim is 9.00 acre-feet.

11. An Order was issued setting a deadline for Claimants Stephen M. Kalbach, Phillip A. Kalbach, and Michael A. Kalbach to address the issue remarks. The Order required Claimants Stephen M. Kalbach, Phillip A. Kalbach, and Michael A. Kalbach to file statements by **October 28, 2022** indicating whether they agree or disagree that the following changes be made to the claims in this Case:

**Claim 39E 13932-00:**

- No changes will be made to the elements of the claims.
- The issue remarks will be removed.

**Claim 39E 30139041:**

- The priority date will be changed to March 7, 1962.
- A 9.00 acre-feet volume will be added to the claim.
- The issue remarks will be removed.

The Order indicated that if nothing were filed by the deadline, this Master would conclude the Claimants agree with the proposed resolutions and a Master's Report would be issued. The following language was included in the Order:

Failure to comply with the terms of this Order may result in sanctions, up to and including entry of default and termination of a water right claim or dismissal of objections. Rule 22, W.R.Adj.R.

12. Nothing was filed in response to the Order.

**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.

3. Pursuant to Rule 22, W.R.Adj.R., if a claimant, objector, or intervenor fails to appear at a scheduled conference or hearing or fails to comply with an order issued by the Water Court, the Water Court may issue such orders of sanction with regard thereto as are just.

4. The notice-type issue remarks decreed on claims 39E 13932-00 and 39E 30139041 have served their notice purpose. As no objections were filed, no further proceedings are required.

#### RECOMMENDATIONS

1. The issue remarks should be removed from claim 39E 13932-00 with no changes to the elements of the claim.

2. The priority date for claim 39E 30139041 should be changed to March 7, 1962 and a 9.00 acre-feet volume should be added. The issue remarks should be removed from claim 39E 30139041.

Post Decree Abstracts of Water Right Claims are served with the Report for review.

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Anika M. Stern  
Senior Water Master

#### **Service via USPS Mail:**

Stephen M. Kalbach  
166 Horse Creek Trail  
Baker, MT 59313

Phillip A. Kalbach  
162 Horse Creek Trail  
Baker, MT 59313

Michael A. Kalbach  
PO Box 213  
Spearfish, SD 57783-0213

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**BOXELDER CREEK**  
**BASIN 39E**

**Water Right Number:** 39E 13932-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:**

STEPHEN M KALBACH  
166 HORSE CREEK TRAIL  
BAKER, MT 59313

PHILLIP A KALBACH  
162 HORSE CREEK TRAIL  
BAKER, MT 59313

MICHAEL A KALBACH  
PO BOX 213  
SPEARFISH, SD 57783 0213

**Priority Date:** AUGUST 29, 1969

**Type of Historical Right:** FILED

**Purpose (use):** IRRIGATION

**Irrigation Type:** WATER SPREADING

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FLOW WATER SPREADING.

**Volume:** 55.50 AC-FT

**Climatic Area:** 2 - MODERATELY HIGH

**Maximum Acres:** 37.00

**Source Name:** UNNAMED TRIBUTARY OF BOXELDER 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		NWSESW	1	1N	61E	CARTER

**\*Period of Diversion:** MAY 1 TO SEPTEMBER 1

**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>
	NWSESW	1	1N	61E	CARTER

**Diversion to Reservoir:** DIVERSION # 1

**Dam Height:** 9.00 FEET

**Depth:** 6.00 FEET

**Surface Area:** 1.17 ACRES

**Capacity:** 2.80 ACRE-FEET

**\*Period of Use:** MAY 1 TO SEPTEMBER 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	27.00		SWSW	1	1N	61E	CARTER
2	5.00		W2SESW	1	1N	61E	CARTER
3	5.00		SENWSW	1	1N	61E	CARTER
<b>Total:</b>	<u>37.00</u>						

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
BOXELDER CREEK  
BASIN 39E**

**Water Right Number:** 39E 30139041 STATEMENT OF CLAIM

**Version:** 2 -- POST DECREE

**Status:** ACTIVE

**Owners:**

STEPHEN M KALBACH  
166 HORSE CREEK TRAIL  
BAKER, MT 59313

PHILLIP A KALBACH  
162 HORSE CREEK TRAIL  
BAKER, MT 59313

MICHAEL A KALBACH  
PO BOX 213  
SPEARFISH, SD 57783 0213

**Priority Date:** MARCH 7, 1962

**Type of Historical Right:** FILED

**Purpose (use):** DOMESTIC

**Flow Rate:** 12.00 GPM

**Volume:** 9.00 AC-FT

**Households:** 1

**Maximum Acres:** 3.00

**Source Name:** GROUNDWATER

**Source Type:** GROUNDWATER

FLOWING ARTESIAN WELL

**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	2	NE	1	1N	61E	CARTER

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

**Diversion Means:** WELL

**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	3.00	2	NE	1	1N	61E	CARTER

**Total:** 3.00