

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
WILLOW CREEK BASIN (41N)  
PRELIMINARY DECREE

\*\*\*\*\*

CLAIMANT: Flesch Family, LLC

**CASE: 41N-0263-R-2022**

41N 153101-00

41N 153102-00

41N 153105-00

41N 153123-00

**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**

All water right claims that appeared in the Preliminary Decree for Willow Creek (Basin 41N) were subject to "issue remarks" resulting from pre-decree examination by

the DNRC, objections, and counterobjections.

Claims 41N 153101-00, 41N 153102-00, 41N 153105-00, and 41N 153123-00 were consolidated into Case 41N-0263-R-2022 to resolve the issue remarks.

#### FINDINGS OF FACT

1. Claims 41N 153105-00 and 41N 153123-00 received the following substantive issue remark:

THE CLAIMED SOURCE MAY BE QUESTIONABLE. BASED ON AVAILABLE DATA, THE SOURCE MAY BE SURFACE WATER FROM UNNAMED TRIBUTARY OF WILLOW CREEK, WEST FORK.

2. On June 14, 2022, the Court consolidated the claims and set a filing deadline for the Claimants to respond if they did not agree that the suggested modification to the source for claims 41N 153105-00 and 41N 153123-00 was historically accurate. Nothing was filed by the ordered deadline.

3. Each of the above-captioned claims received notice-type issue remarks during the DNRC's claim reexamination.

#### PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.

2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. A preponderance of the evidence is evidence that shows a fact is "more probable than not." *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

6. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

7. When resolving issue remarks, the 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. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

8. If a claimant fails to comply with an order issued by the Water Court, the Court may issue orders of sanction that are just. Rule 22, W.R.Adj.R.

#### CONCLUSIONS OF LAW

1. The information in the record is sufficient to resolve the above-listed issue remarks appearing on the claims. Because the Claimants did not respond to the filing deadline, a preponderance of the evidence shows that the source element for claims 41N 153105-00 and 41N 153123-00 should be modified as described in Finding of Fact No. 1. These modifications resolve the issue remarks, and the issue remarks should be removed from the claims.

2. The notice-type issue remark appearing on each of the claims served their notice purpose and should be removed from the claims.

#### RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

Post decree abstracts of the water right claims reflecting the recommended changes are attached to this Report.

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Eugene C. White  
Water Master

**Service via USPS Mail:**

Flesch Family, LLC

725 1<sup>st</sup> St. S.

Shelby, MT 59474-1820

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
WILLOW CREEK  
BASIN 41N**

**Water Right Number:** 41N 153101-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** FLESCH FAMILY LLC  
725 1ST ST S  
SHELBY, MT 59474 1820

**Priority Date:** DECEMBER 31, 1925

**Type of Historical Right:** USE

**Purpose (use):** STOCK

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

**Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

**Source Name:** WEST FORK WILLOW 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		SWNWSW	23	33N	2W	TOOLE

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

**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>
	SWNWSW	23	33N	2W	TOOLE

**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			W2NWSW	23	33N	2W	TOOLE

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
WILLOW CREEK  
BASIN 41N**

**Water Right Number:** 41N 153102-00 STATEMENT OF CLAIM  
**Version:** 4 -- POST DECREE  
**Status:** ACTIVE

**Owners:** FLESCH FAMILY LLC  
725 1ST ST S  
SHELBY, MT 59474 1820

**Priority Date:** DECEMBER 31, 1916

**Type of Historical Right:** USE

**Purpose (use):** STOCK

**\*Flow Rate:** NO FLOW RATE HAS BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

**Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

**Source Name:** UNNAMED TRIBUTARY OF CROOKED COULEE

**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		SENE	5	33N	1E	TOOLE

**Period of Diversion:** SEPTEMBER 15 TO MARCH 31

**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>
	SENE	5	33N	1E	TOOLE

**Diversion to Reservoir:** DIVERSION # 1

**Period of Use:** SEPTEMBER 15 TO MARCH 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			SENE	5	33N	1E	TOOLE

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
WILLOW CREEK  
BASIN 41N**

**Water Right Number:** 41N 153105-00 STATEMENT OF CLAIM  
**Version:** 4 -- POST DECREE  
**Status:** ACTIVE

**Owners:** FLESCH FAMILY LLC  
725 1ST ST S  
SHELBY, MT 59474 1820

**Priority Date:** DECEMBER 31, 1939

**Type of Historical Right:** USE

**Purpose (use):** STOCK

**\*Flow Rate:** NO FLOW RATE HAS BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

**Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

**Source Name:** UNNAMED TRIBUTARY OF WEST FORK WILLOW 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		SENE	27	33N	2W	TOOLE

**Period of Diversion:** MAY 1 TO SEPTEMBER 15

**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>
	SENE	27	33N	2W	TOOLE

**Diversion to Reservoir:** DIVERSION # 1

**Period of Use:** MAY 1 TO SEPTEMBER 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			SENE	27	33N	2W	TOOLE

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
WILLOW CREEK  
BASIN 41N**

**Water Right Number:** 41N 153123-00 STATEMENT OF CLAIM  
**Version:** 4 -- POST DECREE  
**Status:** ACTIVE

**Owners:** FLESCH FAMILY LLC  
725 1ST ST S  
SHELBY, MT 59474 1820

**Priority Date:** DECEMBER 31, 1929

**Type of Historical Right:** USE

**Purpose (use):** STOCK

**\*Flow Rate:** NO FLOW RATE HAS BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

**Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

**Source Name:** UNNAMED TRIBUTARY OF WEST FORK WILLOW 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		SENESE	22	33N	2W	TOOLE

**Period of Diversion:** APRIL 1 TO NOVEMBER 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>
	SENESE	22	33N	2W	TOOLE

**Diversion to Reservoir:** DIVERSION # 1

**Dam Height:** 11.00 FEET

**Depth:** 8.00 FEET

**Surface Area:** 0.90 ACRES

**Capacity:** 2.88 ACRE-FEET

**Period of Use:** APRIL 1 TO NOVEMBER 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			SENESE	22	33N	2W	TOOLE