

41N-0414-R-2022

November 4, 2022

Montana Water Court

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

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CLAIMANTS: Gary A. Wolfe; Harry L. Wolfe

CASE: 41N-0414-R-2022  
41N 30023134

**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.

Claim 41N 30023134 was consolidated into Case 41N-0414-R-2022 to resolve the issue remark.

### FINDINGS OF FACT

1. Claim 41N 30023134 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 20, 2022, the Court consolidated the claim and set a filing deadline for the Claimants to respond if they did not agree that the suggested modification to the source element for claim 41N 30023134 was historically accurate.

3. On July 21, 2022, Claimants Harry L. and Gary A. Wolfe filed a *Response* stating that they agreed with the proposed modification to the source element for claim 41N 30023134.

### 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 remark appearing on the claim. Based on the information contained in the Claimant's *Response*, the source element for claim 41N 30023134 should be modified as described in Finding of Fact No. 1. This modification resolves the issue remark, and the issue remark 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.

A post decree abstract of the water right claim reflecting the recommended changes is attached to this Report.

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Eugene C. White  
Water Master

**Service via USPS Mail:**  
Gary A. Wolfe  
P.O. Box 851  
Shelby, MT 59474-0851

**Service via USPS Mail**  
Harry L. Wolfe  
P.O. Box 758  
Shelby, MT 59474-0758

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

**Water Right Number:** 41N 30023134 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** GARY A WOLFE  
PO BOX 851  
SHELBY, MT 59474 0851

HARRY L WOLFE  
PO BOX 758  
SHELBY, MT 59474 0758

**Priority Date:** DECEMBER 31, 1916

**Type of Historical Right:** USE

**Purpose (use):** STOCK

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. 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:** 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		SWNWSE	5	33N	1W	TOOLE

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

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

**Period of Use:** SEPTEMBER 15 TO MAY 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			SWNWSE	5	33N	1W	TOOLE

**Remarks:**

THIS SPLIT CLAIM WAS AUTHORIZED BY THE WATER COURT BASED ON INFORMATION IN CLAIM NO. 41N 157604-00.

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 41N TEIMPORARY PRELIMINARY DECREE ISSUED 07/06/1984.