

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: James E. Smith Family Trust

CASE 76D-0521-R-2023
76D 140157-00

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

Statement of the case

Fish and wildlife claim 76D 140157-00 received the following issue remarks:

AN AMENDMENT WAS SUBMITTED ON 02/10/2020 REQUESTING TO AMEND THE FLOW RATE AND VOLUME. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

THE CAPACITY OF THE DIVERSION AND CONVEYANCE SYSTEM CANNOT BE DETERMINED AND THE FLOW RATE REMAINS AS ORIGINALLY CLAIMED. THE CLAIMED FLOW RATE CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE FLOW RATE WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

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.

THE CLAIMANT DID NOT IDENTIFY THE PERIOD OF DIVERSION FOR THIS RIGHT. A PERIOD OF DIVERSION HAS BEEN ADDED TO MATCH THE PERIOD OF USE. IF NO OBJECTIONS ARE RECEIVED TO THE PERIOD OF DIVERSION OR PERIOD OF USE, THOSE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS ISSUE REMARK WILL BE REMOVED FROM THIS CLAIM.

DITCH NAME 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.

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

Montana law requires the Water Court to resolve issue remarks. Information in the claim file resolved the issue remarks.

Issues

1. What is the historically accurate flow rate and volume for claim 76D 140157-00?
2. Are the issue remarks on claim 76D 140157-00 resolved?

Finding of fact

The flow rate and volume for fish and wildlife claim 76D 140157-00 should be reduced to 4.50 CFS and 368.77 AF.

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. This prima facie proof may be contradicted and 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 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

Issues 1 and 2 – flow rate and volume; issue remark resolution

Several issue remarks on claim 76D 140157-00 concern flow rate and volume. In particular, an issue remark notes a 2020 amendment to flow rate and volume was filed but not processed. The pre-decree amendment should be implemented to reduce the flow

rate and volume and resolve the issue remarks concerning the amendment, and the flow rate and volume.

Issue remarks on claim 76D 140157-00 note period of diversion and ditch name were modified by the DNRC during claims examination. The issue remarks instructed claimant and other water users that if no objections were filed to the modified period of diversion and ditch name, the period of diversion and ditch name would remain as they appear on the Preliminary Decree abstract. No one objected to the period of diversion or ditch name.

Conclusions of law

The claimant’s proposed pre-decree amendments to the flow rate and volume identified by fish and wildlife claim 76D 140157-00 are reductions within the parameters of the statement of claim, justify the modifications to the claim, and resolve the amendment, and flow rate and volume issue remarks on the claim.

The Preliminary Decree abstract identifies the historically accurate period of diversion and ditch name. The issue remarks concerning period of diversion and ditch name served their notice purpose.

Recommendations

Fish and wildlife claim 76D 140157-00 should be modified as follows to accurately reflect historical use.

<u>FLOW RATE:</u>	122.00 CFS	4.50 CFS
<u>VOLUME:</u>	88,327.00 AF	368.77 AF

The issue remarks should be removed from the claim abstract.

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

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail

James E Smith Family Trust
PO Box 255
Fortine MT 59918-0255

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

Water Right Number: 76D 140157-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: SMITH, JAMES E FAMILY TRUST
PO BOX 255
FORTINE, MT 59918 0255

Priority Date: AUGUST 29, 1924

Type of Historical Right: FILED

Purpose (use): FISH AND WILDLIFE

Flow Rate: 4.50 CFS

Volume: 368.77 AC-FT

THE USE OF THIS WATER APPEARS TO BE LARGELY NONCONSUMPTIVE.

Source Name: DEEP 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		NENENW	29	35N	25W	LINCOLN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

Ditch Name: KLINKE-ZELLER DITCH

Reservoir: OFFSTREAM **Reservoir Name:** BLACK LAKE

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SWNWSE	19	35N	25W	LINCOLN

Diversion to Reservoir: DIVERSION # 1

Depth: 37.00 FEET

Surface Area: 17.16 ACRES

Capacity: 317.46 ACRE-FEET

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			W2W2SE	19	35N	25W	LINCOLN
2			E2E2SW	19	35N	25W	LINCOLN