

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: Schelling Family LLC

CASE 76D-0523-R-2023

76D 128984-00

**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

The Water Court issued two decrees for Basin 76D - the Temporary Preliminary Decree in 1984 and the Preliminary Decree in 2021.

Municipal claim 76D 128984-00 appeared in the Preliminary Decree with issue remarks. Issue remarks most often 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. The Court may also add issue remarks, typically providing some sort of notice to water users concerning a claim.

The issue remarks on the claim identify the following issues:

- the addition of a 1.56 AF reservoir to the point of diversion, and
- existence of the reservoir.

Montana law requires the Water Court to resolve issue remarks.

### Issue

Are the issue remarks resolved?

### Findings of fact

Claim 76D 128984-00 was the subject of previous Water Court proceedings. The Court adopted the 1.56 AF reservoir as historically accurate based upon a November 10, 1988 DNRC Memorandum. (*See* Apr. 4, 1989 Master's Report, Finding of Fact 3, Case 76D-84 and Jul. 11, 1989 Order Adopting Master's Report.)

### 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. *Prima facie* proof may be 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 a “modest standard” and 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**

### **Issue remark resolution**

The issue remark concerning addition of the 1.56 AF reservoir to the claim provided notice to other water users of this addition, and the opportunity to object to the modification. No one objected to the claim.

DNRC provided no information supporting its placement of the issue remark on the claim questioning existence of the reservoir. The issue remark questioning existence of the reservoir does not outweigh the record or previous decision made by the Court. The claim should remain as adjudicated by the Court during Temporary Preliminary Decree proceedings.

### **Conclusions of law**

The claim file and information before the Court provide a sufficient basis to resolve the issue remarks. The Court previously adjudicated the claim finding the reservoir’s presence and size to be historically accurate. The issue remark concerning the

addition of the reservoir to the point of diversion served its notice purpose. The issue remarks are resolved.

## **Recommendations**

Municipal claim 76D 128984-00 accurately reflects historical use. No changes to the elements of the claim should be made.

The issue remarks should be removed from the claim abstract.

A Post Decree Abstract of Water Right Claim accompanies this Report to confirm removal of the issue remarks in the state's centralized water right record system.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

## **Service via USPS Mail**

Schelling Family LLC  
PO Box 473  
Fortine MT 59918

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

**Water Right Number:** **76D 128984-00** STATEMENT OF CLAIM

**Version:** 5 -- POST DECREE

**Status:** ACTIVE

**Owners:** SCHELLING FAMILY LLC  
PO BOX 473  
FORTINE, MT 59918

**Priority Date:** MAY 25, 1916

**Type of Historical Right:** FILED

**Purpose (use):** MUNICIPAL

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

**Volume:** 100.00 AC-FT

**\*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		NWNWNW	32	35N	25W	LINCOLN

**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>
	NWNWNW	32	35N	25W	LINCOLN

**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			S2	25	35N	26W	LINCOLN
2			S2S2	30	35N	25W	LINCOLN
3			N2N2	31	35N	25W	LINCOLN
4			NW	29	35N	25W	LINCOLN

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**Remarks:**

AUTHORIZATION TO CHANGE ISSUED 10-23-89 FOR CHANGE IN POINT OF DIVERSION, NOTICE OF COMPLETION DUE 11-30-93.

AUTHORIZATION TO CHANGE THE POINT OF DIVERSION ISSUED 06/11/99. NOTICE OF COMPLETION DUE 12/31/00. SEE 76D-G(W)128984-01 .