

Montana Water Court
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FILED
08/15/2024
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
41I-2014-R-2023
Ostrem, Eyvind
9.00

**IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MISSOURI RIVER ABOVE HOLTER DAM BASIN (41I)
PRELIMINARY DECREE**

* * * * *

CLAIMANTS: Charles R. Masolo; Masolo Ranch; ~~Gay A. Masolo;~~ **Masolo Family Trust**

OBJECTOR: John Masolo

CASE 41I-2014-R-2023

41I 2749-00
41I 110672-00
41I 110673-00
41I 110674-00
41I 110675-00

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 to 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

The water right claims listed above appeared in the Preliminary Decree for the Missouri River above Holter Dam (Basin 41I) issued on June 24, 2022. Each claim received issue remarks from the Department of Natural Resources and Conservation

(“DNRC”) raising potential legal or factual issues with the claim. Claim 41I 2749-00 also received a late objection from John Masolo. The Water Court consolidated the claims into case 41I-2014-R-2023 to address these issues.

The Court ordered the Claimants to work with the DNRC to resolve the issue remarks on the claims, and on March 20, 2024, DNRC Water Resource Specialist Jason Larsen filed a Memorandum with the Court (“DNRC Memo”). Doc. 5.00.¹ The DNRC Memo makes recommendations as to how to resolve the issue remarks based on Mr. Larsen’s review of the claim files, aerial photos, cadastral information, and historical decrees. The Court twice requested that the Claimants review the DNRC Memo and inform the Court if they disagreed with Mr. Larsen’s recommendations. Docs 6.00 and 7.00. The Court informed the Claimants that if nothing were filed, the Court would conclude the Claimants agree with the DNRC Memo’s recommendations. The Claimants did not respond to the Orders. On May 13, 2024, John Masolo filed a statement withdrawing his late objection in this case. Doc. 8.00.

FINDINGS OF FACT

41I 2749-00:

1. Claim 41I 2749-00 appeared in the Preliminary Decree with the following substantive issue remark:

A LATE OBJECTION HAS BEEN FILED TO THE MAXIMUM ACRES AND PLACE OF USE OF THIS WATER RIGHT CLAIM. IT WILL BE RESOLVED DURING THE ADJUDICATION OF OBJECTIONS TO THE PRELIMINARY DECREE.

This remark was placed in reference to John Masolo’s late objection. Mr. Masolo’s late objection is withdrawn.

41I 110672-00, 41I 110673-00, 41I 110674-00, and 41I 110675-00:

2. Claims 41I 110672-00, 41I 110673-00, 41I 110674-00, and 41I 110675-00 received the following substantive issue remark.

THE TYPE OF HISTORICAL RIGHT AND PRIORITY DATE ARE QUESTIONABLE. THIS RIGHT IS BASED ON CASE NO. 73, SPOKANE CREEK, JEFFERSON COUNTY, DATED 4/12/1892. HOWEVER, CASE NO. 2187, SPOKANE CREEK, LEWIS AND CLARK COUNTY, DATED 7/2/1895, NULLIFIED THIS RIGHT.

¹ “Doc.” refers to the docket number of a document filed in the Water Court’s Full Court Enterprise Case Management system.

The DNRC memo recommends removal of this remark because Case No. 2187 did not nullify this right, and instead simply recognized rights of a downstream senior appropriator. It appears the remark was placed in error.

3. Claims 41I 110673-00, 41I 110674-00, and 41I 110675-00 also received the following substantive remarks:

THE BROADWATER COUNTY WATER RESOURCES SURVEY (1956) APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

THE MAXIMUM COMBINED ACRES FOR THIS GROUP OF SUPPLEMENTAL CLAIMS MAY REQUIRE MODIFICATION PENDING RESOLUTION OF MAXIMUM IRRIGATED ACRES ISSUE.

The DNRC Memo states that Mr. Larsen mapped the acres historically irrigated by these claims based on 1947 USDA aerial imagery. Consistent with Mr. Larsen’s map and recommendations, the following corrections should be made to claims 41I 110673-00, 41I 110674-00, and 41I 110675-00:

Maximum Acres: ~~355.00~~ 325.00

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	35.00 <u>29.50</u>		SE	20	9N	1W	Broadwater
2	10.00 <u>58.80</u>		SWNW <u>W2</u>	21	9N	1W	Broadwater
3	62.00		SW	21	9N	1W	Broadwater
4	33.00 <u>32.50</u>		NW	28	9N	1W	Broadwater
5	115.00 <u>204.20</u>		NE	29	9N	1W	Broadwater
6	5.00		SENW	29	9N	1W	Broadwater
7	40.00		SE	29	9N	1W	Broadwater
8	55.00		SW	29	9N	1W	Broadwater

The DNRC Memo recommends that the flow rate issue remark be removed because the claims are based on a historical decree. These water rights do not include a “maximum combined acres” and therefore no action is necessary in response to the maximum combined acres remark.

PRINCIPLES OF LAW

1. Section 85-2-248(2), MCA requires the Water Court to resolve all issue remarks that are not resolved through the objection process. 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. § 85-2-248(3), MCA.

2. A properly filed claim of an existing right or an amended claim of existing right is prima facie proof of its content. § 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 the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

CONCLUSIONS OF LAW

1. The Findings of Fact above are supported by a preponderance of the evidence. The claims should be modified as described above.

2. The late objection remark on claim 41I 2749-00 is resolved by John Masolo's withdrawal of his objection. The type of historical right and priority date remark on each claim and the maximum combined acres issue remark on claims 41I 110673-00, 41I 110674-00, and 41I 110675-00 fail to overcome the prima facie claims. The remaining issue remarks are resolved by the modifications described above and information in the DNRC memo. The issue remarks should be removed from the claims.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact above and remove the issue remarks from the claims.

A Post Decree Abstract of Water Right Claim for each claim reflecting the recommended changes is attached to this Report for review.

ELECTRONICALLY SIGNED AND DATED BELOW.

SERVICE VIA USPS MAIL

Charles R Masolo
Masolo Family Trust
~~Gay A Masolo~~
20 Buck Dr
Townsend, MT 59644

Masolo Ranch
% John Masolo
242 Beaver Creek Rd
Winston, MT 59647

John Masolo
242 Beaver Creek Rd
Winston, MT 59647

Notice: Caption & Service List Updated 8.13.24

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, ABOVE HOLTER DAM
BASIN 41I

Water Right Number: 41I 2749-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: CHARLES R MASOLO
20 BUCK DR
TOWNSEND, MT 59644-9651

MASOLO RANCH
% JOHN MASOLO
242 BEAVER CREEK RD
WINSTON, MT 59647-8302

Priority Date: OCTOBER 31, 1921

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 170.00 GPM

*Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 10.00

Source Name: SPRING, UNNAMED TRIBUTARY OF BEAVER CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1		SWNWSW	29	9N	1E	BROADWATER
Period of Diversion:		APRIL 15 TO OCTOBER 15				
Diversion Means:		HEADGATE				
Ditch Name:		DAVIES DITCH				
Period of Use:		APRIL 15 TO OCTOBER 15				

Place of Use:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	10.00		NWSW	29	9N	1E	BROADWATER
Total:		10.00					

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

2741-00

2749-00

2751-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, ABOVE HOLTER DAM
BASIN 41I**

Water Right Number: 41I 110672-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: MASOLO FAMILY TRUST
20 BUCK DR
TOWNSEND, MT 59644-9651

Priority Date: APRIL 1, 1881

Type of Historical Right: DECREED

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: SPOKANE 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		W2SW	21	9N	1W	BROADWATER
Period of Diversion:	APRIL 15 TO DECEMBER 15					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
2		NWNW	28	9N	1W	BROADWATER
Period of Diversion:	APRIL 15 TO DECEMBER 15					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
3		NE	29	9N	1W	BROADWATER
Period of Diversion:	APRIL 15 TO DECEMBER 15					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
4		NWSE	29	9N	1W	BROADWATER
Period of Diversion:	APRIL 15 TO DECEMBER 15					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
5		SW	29	9N	1W	BROADWATER
Period of Diversion:	APRIL 15 TO DECEMBER 15					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
Period of Use:	APRIL 15 TO DECEMBER 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			W2SW	21	9N	1W	BROADWATER
2			NWNW	28	9N	1W	BROADWATER
3			NE	29	9N	1W	BROADWATER
4			NWSE	29	9N	1W	BROADWATER
5			SW	29	9N	1W	BROADWATER

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

110672-00 110673-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, ABOVE HOLTER DAM
BASIN 41I**

Water Right Number: 41I 110673-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: MASOLO FAMILY TRUST
20 BUCK DR
TOWNSEND, MT 59644-9651

Priority Date: APRIL 1, 1881

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 4.00 CFS

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 325.00

Source Name: SPOKANE 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		NWSWSW	29	9N	1W	BROADWATER
Period of Diversion:	APRIL 15 TO OCTOBER 15					
Diversion Means:	HEADGATE					
2		NWNESW	29	9N	1W	BROADWATER
Period of Diversion:	APRIL 15 TO OCTOBER 15					
Diversion Means:	HEADGATE					
3		NENESW	29	9N	1W	BROADWATER
Period of Diversion:	APRIL 15 TO OCTOBER 15					
Diversion Means:	HEADGATE					

Period of Use: APRIL 15 TO OCTOBER 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	29.50		SE	20	9N	1W	BROADWATER
2	58.80		W2	21	9N	1W	BROADWATER
3	32.50		NW	28	9N	1W	BROADWATER
4	204.20			29	9N	1W	BROADWATER

Total: 325.00

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

110673-00 110674-00 110675-00

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

110672-00 110673-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, ABOVE HOLTER DAM
BASIN 41I**

Water Right Number: 41I 110674-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: MASOLO FAMILY TRUST
20 BUCK DR
TOWNSEND, MT 59644-9651

Priority Date: MAY 15, 1881

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 4.00 CFS

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 325.00

Source Name: SPOKANE 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		NWSWSW	29	9N	1W	BROADWATER
Period of Diversion:	APRIL 15 TO OCTOBER 15					
Diversion Means:	HEADGATE					
2		NWNESW	29	9N	1W	BROADWATER
Period of Diversion:	APRIL 15 TO OCTOBER 15					
Diversion Means:	HEADGATE					
3		NENESW	29	9N	1W	BROADWATER
Period of Diversion:	APRIL 15 TO OCTOBER 15					
Diversion Means:	HEADGATE					

Period of Use: APRIL 15 TO OCTOBER 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	29.50		SE	20	9N	1W	BROADWATER
2	58.80		W2	21	9N	1W	BROADWATER
3	32.50		NW	28	9N	1W	BROADWATER
4	204.20			29	9N	1W	BROADWATER

Total: 325.00

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

110673-00	110674-00	110675-00
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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, ABOVE HOLTER DAM
BASIN 41I**

Water Right Number: 41I 110675-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: MASOLO FAMILY TRUST
20 BUCK DR
TOWNSEND, MT 59644-9651

Priority Date: MAY 15, 1882

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 4.00 CFS

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 325.00

Source Name: SPOKANE 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		NWSWSW	29	9N	1W	BROADWATER
Period of Diversion:	APRIL 15 TO OCTOBER 15					
Diversion Means:	HEADGATE					
2		NWNESW	29	9N	1W	BROADWATER
Period of Diversion:	APRIL 15 TO OCTOBER 15					
Diversion Means:	HEADGATE					
3		NENESW	29	9N	1W	BROADWATER
Period of Diversion:	APRIL 15 TO OCTOBER 15					
Diversion Means:	HEADGATE					

Period of Use: APRIL 15 TO OCTOBER 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	29.50		SE	20	9N	1W	BROADWATER
2	58.80		W2	21	9N	1W	BROADWATER
3	32.50		NW	28	9N	1W	BROADWATER
4	204.20			29	9N	1W	BROADWATER

Total: 325.00

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

110673-00	110674-00	110675-00
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