

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

* * * * *

CLAIMANT: Davis Bar Triangle T Ranch Inc.

CASE 41I-0065-R-2023

41I 23981-00

41I 117773-00

41I 30160078

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

The above-captioned claims appeared in the Preliminary Decree for the Missouri River Above Holter Dam (Basin 41I) issued on June 24, 2022. The claims are owned by Davis Bar Triangle T Ranch Inc. The claims did not receive objections,

counterobjections, or notices of intent to appear, but did receive issue remarks. Issue remarks are notations identifying potential legal or factual issues with water rights and the Water Court is required to resolve these potential issues.

FINDINGS OF FACT

41I 23981-00

1. Claim 41I 23981-00 was decreed as a natural subirrigation from the following sources:

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Source Name:      SUBIRRIGATION, UNNAMED TRIBUTARY OF SHERLOCK CREEK
Source Type:      GROUNDWATER
Source Name:      UNNAMED TRIBUTARY OF SHERLOCK CREEK
Source Type:      GROUNDWATER
                  ALSO KNOWN AS SPRING GULCH CREEK
    
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2. The claim was decreed with a 180.00-acre place of use as follows:

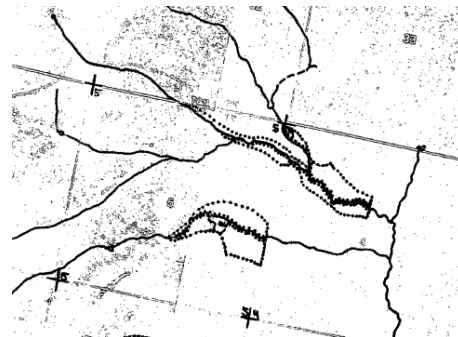
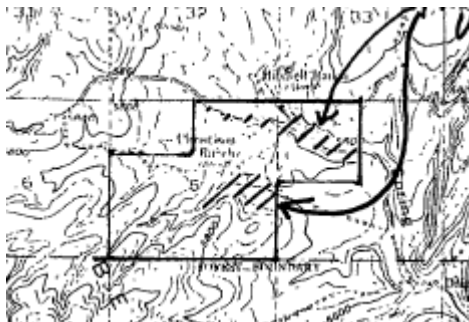
ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	60.00		NW	4	5N	5E	BROADWATER
2	30.00		N2NE	5	5N	5E	BROADWATER
3	90.00		N2SE	5	5N	5E	BROADWATER
Total:	180.00						

3. The claim received the following issue remarks:

USGS ORTHOPHOTOQUADS FRANCIS & SIXMILE MT (1976) AND INFORMATION IN THE CLAIM FILE APPEAR TO INDICATE FEWER ACRES IRRIGATED THAN CLAIMED.

THIS CLAIM APPEARS TO BE CLAIMING TWO SEPARATE SOURCES OF WATER. MORE THAN ONE WATER RIGHT MAY BE INVOLVED.

4. The maps attached statement of claim depicts two distinct sources of water – Sherlock Creek and an unnamed tributary of Sherlock Creek:



5. The DNRC claim examiner was only able to verify 85.00 irrigated acres:

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data source # 1: USGS Orthophotoquads date: 1976
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ACRES-----LOT BLK QTR SEC SEC TWP RGE CNTY
001 21.00-----NW 04 05N 05E BR
002 21.00-----N2NE 05 05N 05E BR
003 21.00-----N2SE 05 05N 05E BR
Total 85.00-----
comments:
---See attached examination worksheet p.o.u. addendum
    
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6. Claimant filed information addressing the issue remarks. (Doc.¹ 6.00).
7. Based on the information provided by Claimant, only 66.5 acres were historically irrigated under claim 41I 23981-00. The 66.5 acres are described as follows:

<u>ID</u>	<u>Acres</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	13.12	NW	4	5N	5E	Broadwater
2	15.24	NE	5	5N	5E	Broadwater
3	38.14	SE	5	5N	5E	Broadwater

8. Claimant requested claim 41I 23981-00 be split into two claims, representing each of the claimed sources, and dividing the 66.5-acre place of use as:

41I 23981-00

<u>ID</u>	<u>Acres</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	7.81	W2NW	4	5N	5E	Broadwater
2	3.45	SENW	4	5N	5E	Broadwater
3	4.24	NENE	5	5N	5E	Broadwater
Total: 15.50						

41I 23981-00 Implied Claim (41I 30160078)

<u>ID</u>	<u>Acres</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	1.86	SWSWNW	4	5N	5E	Broadwater
2	10.00	S2SENE	5	5N	5E	Broadwater
3	31.14	NESE	5	5N	5E	Broadwater
4	7.00	NWSE	5	5N	5E	Broadwater
5	1.00	SESWNE	5	5N	5E	Broadwater
Total: 51.00						

9. Claimant's proposed reduced acreage is wholly within the place of use claimed on the statement of claim.
10. As part of Claimant's proposed division of claim 41I 23981-00, they also request modifications to the points of diversion.
11. The point of diversions claimed on the statement of claim are as follows:

⑥ Point of Diversion: County Broadwater
 _____ 1/4 _____ 1/4 NW 1/4, Section 4, T 5 N/S, R 5 E/W*
 Lot _____, Block _____, Subdivision _____
 DNR Means of Diversion:
 Pump Capacity _____ gpm
 Headgate and ditch or pipe
 Flood and dike **Subirrigation**
 "XX"

¹ "Doc." numerical references correlate to case file docket numbers in the Water Court's Full Court case management system.

12. Claimant proposed the following points of diversion for each claim:

41I 23981-00

<u>ID</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	W2NW	4	5N	5E	Broadwater
2	SEnw	4	5N	5E	Broadwater
3	NENE	5	5N	5E	Broadwater

41I 23981-00 Implied Claim (41I 30160078)

<u>ID</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	SWSWNW	4	5N	5E	Broadwater
2	S2SENE	5	5N	5E	Broadwater
3	NESE	5	5N	5E	Broadwater
4	NWSE	5	5N	5E	Broadwater
5	SESWNE	5	5N	5E	Broadwater

13. Claimant’s proposed modifications to the points of diversion are wholly within the points of diversion on the statement of claim.

41I 117773-00

14. Claim 41I 117773-00 appeared in the Basin 41I Preliminary Decree as an October 16, 1968 claim for flood irrigation. The place of use was decreed as follows:

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	123.00		SE	22	6N	2E	BROADWATER
2	100.00		NE	26	6N	2E	BROADWATER
3	158.00		NW	26	6N	2E	BROADWATER
4	94.50		SW	26	6N	2E	BROADWATER
Total:	475.50						

15. The claim received the following issue remarks:

THE BROADWATER COUNTY WATER RESOURCES SURVEY (1956) APPEARS TO INDICATE 350.00 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

THE CLAIMED PRIORITY DATE MAY BE QUESTIONABLE. THE PRIORITY DATE ON THE SUBMITTED NOTICE OF APPROPRIATION IS 10/25/1968.

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

16. Claimant stated that “the majority of the place of use for claim 41I 117773-00 is irrigated with water from the Broadwater Missouri canal and is no longer irrigated with water diverted from Dry Creek pursuant to claim 41I 117773-00. The only

remaining place of use that is irrigated pursuant to claim 41I 117773-00 is 33 acres located in the N2NE of Section 26, T6N, R2E.” (Doc. 4.00).

17. Claimant also stated that the flow rate should be reduced from 5.00 CFS to 570.00 GPM to account for the reduced irrigated acreage. Additionally, all references to a supplemental place of use are no longer relevant and should be removed from the claim.

18. Claimant addressed the priority date issue remark as follows:

With regard to the priority date issue remark, the filed Notice of Appropriation upon which claim 41I 117773-00 is based, which was filed on October 25, 1968, states that the claimant commenced the appropriation of water on October 16, 1968. A copy of the Statement of Claim for 41I 117773-00 is attached herewith as Exhibit 6. The priority date of October 16, 1968, asserted in the Statement of Claim is therefore appropriate, and the issue remark should be removed.

19. The claims also received the following notice-type issue remarks:

41I 23981-00

POINT OF DIVERSION 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.

41I 117773-00

THE PRIORITY DATE MAY BE QUESTIONABLE. THIS CLAIM IS FOR A FILED APPROPRIATION ON DRY CREEK WITH A PRIORITY DATE POSTDATING CASE NO 331, BROADWATER COUNTY. IF NO OBJECTIONS ARE FILED TO PRIORITY DATE OR TYPE OF HISTORICAL RIGHT, THESE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS REMARK WILL BE REMOVED.

20. Neither of the claims received objections and the remarks served their notice purposes.

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 agrees to reduce or limit a claim, the Water Court may accept the reduction or limitation without reviewing further evidence, unless an unresolved issue remark remains. Rule 17(c), W.R.Adj.R.

9. Implied claims are claims authorized by the water court to be separated and individually identified when a statement of claim includes multiple rights. Rule 2(33), W.R.C.E.R. If the single claim form containing multiple rights has been timely filed, the Section 85-2-221, MCA statutory deadlines for filing claims is satisfied. Rule 35(c)(3), W.R.C.E.R.

Before the Court will recognize an implied claim, a claimant must prove that several factors exist. These include: (1) proof of two or more water rights in the original claim form or the material submitted with the claim form; (2) proof of historic use corroborating the implied claim; and (3) proof that recognizing the implied claim(s) will avoid causing a change to historic water use or increase the historic burden to other water users. *Bodle v. Thomas-Rupert*, Case 76HA-74, 2020 Mont. Water LEXIS 361, *26-27 (citing *In re Foss*, Case 76HF-580, 2013 Mont. Water LEXIS 17, * 32 (Jan. 31, 2013); *In re Martinell*, Case 41A-148, 2018 Mont. Water LEXIS 3, *6 (June 14, 2018)).

CONCLUSIONS OF LAW

41I 23981-00

1. The place of use and source issue remarks overcome the prima facie status of claim 41I 23981-00. Claimant showed by a preponderance of the evidence that the place of use for claim 41I 23981-00 is 66.50 acres and claims two separate sources.

2. An implied claim should be generated from claim 41I 23981-00. Two separate sources were claimed on the statement of claim. The historic use of claim 41I 23981-00, with the reduced place of use, has been proven and there is no increased burden on other water users because there is a significant reduction in irrigated acres and there is no change in the amount of water diverted.

41I 117773-00

3. The place of use issue remark overcomes the prima facie status of claim 41I 117773-00. The place of use should be reduced to 33.00 acres in the N2NE of Section 26, T6N, R2E, Broadwater County.

4. The priority date issue remark does not overcome the prima facie status of claim 41I 117773-00. The notice of appropriation attached to the statement of claim indicates the claimed water was first used on October 16, 1968.

Notice-Type Issue Remarks

5. The notice-type issue remarks in Finding of Fact No. 19 served their notice purposes.

RECOMMENDATIONS

1. Claim 41I 23981-00 should be modified as described above.
2. An implied claim (41I 30160078) should be generated with the elements described above.
3. The place of use and maximum acres of claim 41I 117773-00 should be reduced to 33.00 acres in the N2NE of Section 26, T6N, R2E, Broadwater County as follows:

<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	27.00		NENE	26	6N	2E	BROADWATER
2	6.00		E2NWNE	26	6N	2E	BROADWATER
Total:	<u>33.00</u>						

4. The issue remarks should be removed from claim abstracts.

A post decree abstract of each water right claim reflecting these recommendations are attached to this Report.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via Electronic Mail

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Notice: Caption & Service List Updated 6.17.24

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

Water Right Number: 411 23981-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: DAVIS BAR TRIANGLE T RANCH INC
% WILLIAM L DAVIS
379 FLYNN LN
TOWNSEND, MT 59644-9729

Priority Date: MAY 1, 1896

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: NATURAL SUBIRRIGATION

***Flow Rate:** NO FLOW RATE HAS BEEN DECREED FOR THIS USE OF NATURAL SUBIRRIGATION.

***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: 15.50

Source Name: SUBIRRIGATION, UNNAMED TRIBUTARY OF SHERLOCK CREEK

Source Type: GROUNDWATER

***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		W2NW	4	5N	5E	BROADWATER
Period of Diversion:		APRIL 1 TO NOVEMBER 15				
Diversion Means:		SUBIRRIGATION				
2		SEW	4	5N	5E	BROADWATER
Period of Diversion:		APRIL 1 TO NOVEMBER 15				
Diversion Means:		SUBIRRIGATION				
3		NENE	5	5N	5E	BROADWATER
Period of Diversion:		APRIL 1 TO NOVEMBER 15				
Diversion Means:		SUBIRRIGATION				

Period of Use: APRIL 1 TO NOVEMBER 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	7.81		W2NW	4	5N	5E	BROADWATER
2	3.45		SEW	4	5N	5E	BROADWATER
3	4.24		NENE	5	5N	5E	BROADWATER
Total:	15.50						

Remarks:

POINT OF DIVERSION AND PLACE OF USE INCLUDE GOVT LOT 4 IN SEC 04 AND GOVT LOT 1 AND 2 IN SEC 5
TWP 05N RGE 05E, BROADWATER COUNTY.

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

Water Right Number: 41I 117773-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: DAVIS BAR TRIANGLE T RANCH INC
% WILLIAM L DAVIS
379 FLYNN LN
TOWNSEND, MT 59644-9729

Priority Date: OCTOBER 16, 1968

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 570.00 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: 33.00

Source Name: DRY 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		SWNWNE	25	6N	2E	BROADWATER

Period of Diversion: APRIL 1 TO NOVEMBER 1

Diversion Means: HEADGATE

Ditch Name: DAVIS DITCH

2		SEWNNE	25	6N	2E	BROADWATER
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Period of Diversion: APRIL 1 TO NOVEMBER 1

Diversion Means: HEADGATE

Ditch Name: WELCH DITCH

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	27.00		NENE	26	6N	2E	BROADWATER
2	6.00		E2NWNE	26	6N	2E	BROADWATER

Total: 33.00

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

Water Right Number: 411 30160078 STATEMENT OF CLAIM

Version: 1 -- ORIGINAL RIGHT

Status: ACTIVE

Owners: DAVIS BAR TRIANGLE T RANCH INC
% WILLIAM L DAVIS
379 FLYNN LN
TOWNSEND, MT 59644-9729

Priority Date: MAY 1, 1896

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: NATURAL SUBIRRIGATION

Flow Rate: NO FLOW RATE HAS BEEN DECREED FOR THIS USE OF NATURAL SUBIRRIGATION.

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: 51.00

Source Name: UNNAMED TRIBUTARY OF SHERLOCK CREEK

Source Type: GROUNDWATER

ALSO KNOWN AS SPRING GULCH CREEK

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		SWSWNW	4	5N	5E	BROADWATER
Period of Diversion:	APRIL 1 TO NOVEMBER 15					
Diversion Means:	SUBIRRIGATION					
2		S2SENE	5	5N	5E	BROADWATER
Period of Diversion:	APRIL 1 TO NOVEMBER 15					
Diversion Means:	SUBIRRIGATION					
3		NESE	5	5N	5E	BROADWATER
Period of Diversion:	APRIL 1 TO NOVEMBER 15					
Diversion Means:	SUBIRRIGATION					
4		NWSE	5	5N	5E	BROADWATER
Period of Diversion:	APRIL 1 TO NOVEMBER 15					
Diversion Means:	SUBIRRIGATION					
5		SESWNE	5	5N	5E	BROADWATER
Period of Diversion:	APRIL 1 TO NOVEMBER 15					
Diversion Means:	SUBIRRIGATION					

Period of Use: APRIL 1 TO NOVEMBER 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	1.86		SWSWNW	4	5N	5E	BROADWATER
2	10.00		S2SENE	5	5N	5E	BROADWATER
3	31.14		NESE	5	5N	5E	BROADWATER
4	7.00		NWSE	5	5N	5E	BROADWATER
5	1.00		SESWNE	5	5N	5E	BROADWATER
Total:	<u>51.00</u>						

Remarks:

POINT OF DIVERSION AND PLACE OF USE INCLUDE GOVT LOT 4 IN SEC 04 AND GOVT LOT 1 AND 2 IN SEC 5 TWP 05N RGE 05E, BROADWATER COUNTY.