

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270
(406) 586-4364
watercourt@mt.gov

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

CLAIMANT: Flynn Hay & Grain Inc.

CASE 41I-0085-R-2023

41I 3836-00

41I 3838-00

41I 30132153

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 Flynn Hay & Grain Inc. The claims received 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 3836-00

1. Claim 41I 3836-00 appeared in the Basin 41I Preliminary Decree as a claim for flood irrigation of 258.00 acres in Section 11, T6N, R2E, Broadwater County.

2. The claim received the following issue remarks:

THE BROADWATER COUNTY WATER RESOURCES SURVEY (1956) APPEARS TO INDICATE 171.00 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

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

3. The Statement of Claim originally claimed a 290.00-acre place of use. The issue remarks were placed on the claim prior to the Basin 41I Temporary Preliminary Decree.

4. During adjudication of the Basin 41I Temporary Preliminary Decree, in addition to the issue remarks, the United States Department of Interior, Bureau of Reclamation (BOR) objected to the claim and Leonard Lambott filed a Notice of Intent to Appear. The claim was consolidated into Case 41I-331.

5. In resolution of the objection and notice of intent to appear, the Master's Report reduced the place of use and maximum acres to 258.00 acres.

Priority Date Issue Remark

6. Claims 41I 3836-00 and 41I 3838-00 received the following issue remark:

THE PRIORITY DATE MAY BE QUESTIONABLE. THIS CLAIM IS FOR A FILED APPROPRIATION ON DEEP CREEK WITH A PRIORITY DATE POSTDATING CASE NO 465, 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.

7. The only evidence before the Court is the existence of Case No. 465, and the resulting issue remark that appeared on the claims.

41I 30132153

8. Claim 41I 30132153 appeared in the Basin 41I Preliminary Decree as a claim for stock drinking directly from a spring in the NWNWSW of Section 29, T10N, R3E, Broadwater County. The claim received the following issue remark:

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE SPRING CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

9. The DNRC examiner provided the following notes in support of placing the remark on the claim:

Point of diversion issue remain, cannot locate well with info provided

10. The statement of claim does not claim a well, but livestock drinking directly from a spring. Based on the information before the Court, the location of the spring was claimed correctly.

Notice-Type Issue Remarks

11. The claims received notice-type issue remarks as follows:

411 3838-00

THE MOTION OF THE COURT HAS BEEN AMENDED TO CONFORM WITH THE EVIDENCE SUBMITTED BY THE CLAIMANT TO INCLUDE CHANGES IN THE MAXIMUM ACRES AND PLACE OF USE. BECAUSE THESE ELEMENTS WERE NOT INCLUDED ON THE TEMPORARY PRELIMINARY DECREE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THESE CHANGES MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

411 30132153

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 411 DECREE ISSUED 03/08/1995.

12. 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.

CONCLUSIONS OF LAW

41I 3836-00

1. The acres irrigated and maximum acres issue remarks on claim 41I 3836-00 were previously resolved by modifications made during adjudication of the Basin 41I Temporary Preliminary Decree. The Master's Report in Case 41I-331 predated the statutory requirement that the Water Court resolve and remove all issue remarks on a claim, which explains why the issue remarks appearing on claim 41I 3836-00 were not removed by the Master's Report.

Priority Date Issue Remark

2. The priority date issue remark does not overcome the prima facie status of claims 41I 3836-00 and 41I 3838-00. There are several possible explanations for why the claimed rights did not appear in the decree and there is not sufficient evidence before the Court to indicate the claimed priority dates are inaccurate.

41I 30132153

3. The point of diversion issue remark does not overcome the prima facie status of the claim. There is no evidence supporting the issue remark.

Notice-Type Issue Remark

4. The notice-type issue remarks served their notice purposes.

RECOMMENDATION

1. The issue remarks should be removed from the claims.

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

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail
Flynn Hay & Grain Inc
209 Flynn Ln
Townsend, MT 59644

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

Water Right Number: 411 3836-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: FLYNN HAY & GRAIN INC
209 FLYNN LN
TOWNSEND, MT 59644-9770

Priority Date: JUNE 11, 1903

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 5.00 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:** 258.00

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		NENESE	36	7N	2E	BROADWATER

Period of Diversion: APRIL 1 TO OCTOBER 15

Diversion Means: HEADGATE

Ditch Name: MITCHELL-PROSSER-ZUBRICH-FLYNN DITCH

Period of Use: APRIL 1 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	135.00		SW	11	6N	2E	BROADWATER
2	10.00		NWSE	11	6N	2E	BROADWATER
3	93.00		NW	11	6N	2E	BROADWATER
4	20.00		SWNE	11	6N	2E	BROADWATER

Total: 258.00

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.

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

Water Right Number: 411 3838-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: FLYNN HAY & GRAIN INC
209 FLYNN LN
TOWNSEND, MT 59644-9770

Priority Date: JULY 17, 1918

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

***Flow Rate:** 2.50 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:** 258.00

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		NENESE	36	7N	2E	BROADWATER

Period of Diversion: APRIL 1 TO OCTOBER 15

Diversion Means: HEADGATE

Ditch Name: MITCHELL-PROSSER-ZUBRICH-FLYNN DITCH

Period of Use: APRIL 1 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	135.00		SW	11	6N	2E	BROADWATER
2	10.00		SE	11	6N	2E	BROADWATER
3	93.00		NW	11	6N	2E	BROADWATER
4	20.00		NE	11	6N	2E	BROADWATER
Total:	258.00						

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.

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

Water Right Number: 411 30132153 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: FLYNN HAY & GRAIN INC
209 FLYNN LN
TOWNSEND, MT 59644-9770

Priority Date: JULY 31, 1922

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:** SPRING, UNNAMED TRIBUTARY OF CONFEDERATE GULCH

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		NWNWSW	29	10N	3E	BROADWATER

Period of Diversion: JUNE 1 TO OCTOBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: JUNE 1 TO OCTOBER 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			NWNWSW	29	10N	3E	BROADWATER