

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

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
BOULDER RIVER—TRIBUTARY OF THE JEFFERSON RIVER (BASIN 41E)
PRELIMINARY DECREE

CLAIMANT: Tom Carey Cattle Co.

OBJECTORS: Tom Carey Cattle Co.; Estate of William A. Twohy and
Eve D. Twohy

CASE 41E-0276-R-2024
41E 94281-00

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, conclusion 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 mail 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 Temporary Preliminary Decree for Basin 41E was issued on June 20, 1985. The objection filing deadline was December 17, 1985. On November 3, 1987 the Estate of William A. Twohy and Eve D. Twohy filed a Motion To Amend Temporary Decree. At that

time, they were the owners of this claim. The Motion To Amend Temporary Decree was signed and filed by attorney Robert T. Cummins. This was deemed a late objection which was docketed and held to address after issuance of the Preliminary Decree. The following notice remark was added to the abstract of the claim:

A LATE OBJECTION HAS BEEN FILED TO THE PRIORITY DATE OF THIS WATER RIGHT CLAIM. IT WILL BE RESOLVED DURING THE ADJUDICATION OF OBJECTIONS TO THE PRELIMINARY DECREE.

The Preliminary Decree was issued on October 19, 2022. The current owner, Tom Carey Cattle Co., objected to the priority date. The Order Consolidating Case And Setting Scheduling Conference was issued on January 24, 2024. This Order was sent to attorney Robert T. Cummins at the address specified on the Motion To Amend Temporary Decree. The Order was returned as undeliverable and additional research found that Mr. Cummins is deceased.

At the February 14, 2024 scheduling conference, Tom Carey Cattle Co. made a motion to dismiss the Estate of William A. Twohy and Eve D. Twohy late objection. The February 14, 2024 Court Minutes, Order Entering Defaults, Orders Setting Filing Deadlines, and Order Updating Service List set a March 14, 2024 deadline for the Estate of William A. Twohy and Eve D. Twohy to show cause why their late objection should not be dismissed. Nothing was filed. On March 21, 2024 the Order Granting Motion To Dismiss Estate of William A. Twohy and Eve D. Twohy Late Objection was entered.

On April 19, 2024 Tom Carey Cattle Co. filed its Response To Order Setting Show Cause Deadline And Motion To Modify Preliminary Decree Of Water Right 41E 94218-00 To Resolve Objection ["Motion"]. The 2024 documents are viewable in the Court's FullCourt Enterprise case management system.

APPLICABLE LAW

Judicial notice is taken of claims 41E 93903-00, 41E 93994-00, and 41E 94251-00. Rule 202(a)(6), M.R. Evid.

A priority date represents the relative seniority of a particular right to others on the claimed source or hydrologic system. *Vidal v. Kensler*, 100 Mont. 592 (1935).

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to 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 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 including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. The late objection remark should be removed as the late objection was dismissed.

2. The Preliminary Decree states that the priority date is July 31, 1877 and the source is Boulder River. This claim is for a portion of the water right described on the John Smith and Con Smith Notice of Water Right, dated May 20, 1884, and filed that same day with the Jefferson County Recorder. Although difficult to read, it is clear that the source is the "Main" Boulder and that it "was appropriated in the year 1877 in the months of July and August."

Franklin C. Carey, Michael J. Carey, Patrick E. Carey, and Vincent J. Carey claim 41E 93903-00 is for another portion of this same water right. The priority date is July 1, 1877. There are no proceedings pending for this claim.

John Carey Ranch Co. claim 41E 93994-00 is for another portion of this same water right. The priority date is July 1, 1877. There are no proceedings pending for this claim.

Tom Carey Cattle Co. and Dunn Canyon Cattle Co. claim 41E 94251-00 is for another portion of this same water right. The priority date is July 1, 1877. There are no proceedings pending for this claim.

To assure the equal priority of these four claims for portions of the same water right, the priority date should be July 1, 1877.

3. This claim appeared in the Preliminary Decree with the following notice remark:

POINT OF DIVERSION AND DITCH NAME WERE 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.

The remark does not raise an unresolved issue which needs to be addressed. There are no proceedings required for this remark. The remark should be removed as having served its notice purpose.

CONCLUSION OF LAW

The settlement filed by the claimant is sufficient to contradict and overcome the prima facie claim.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court grant the Motion and make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service Via Electronic Mail:

Jeremy A. Michael
Cusick, Farve, Mattick & Refling, P.C.
PO Box 1288
Bozeman, MT 59771-1288
(406) 587-5511
office@cmrlawmt.com

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BOULDER RIVER, TRIBUTARY TO JEFFERSON RIVER
BASIN 41E**

Water Right Number: 41E 94281-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: CAREY, TOM CATTLE CO
2120 MT HWY 69
BOULDER, MT 59632-9730

Priority Date: JULY 1, 1877

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 2.84 CFS

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

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 75.00

Source Name: BOULDER RIVER

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		SENE	24	4N	3W	JEFFERSON

Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: HEADGATE

Ditch Name: CAREY-TWOHY DITCH
DITCH ALSO KNOWN AS SMITH-DUNN DITCH.

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	67.00		NW	30	4N	2W	JEFFERSON
2	8.00		W2W2NE	30	4N	2W	JEFFERSON
Total:	75.00						

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.

94279-00 94280-00 94281-00 94286-00 94287-00