

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: Michael W. McCurry

CASE 76D-0546-R-2023
76D 30121510

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 above captioned domestic claim appeared in the Preliminary Decree with the following issue remarks:

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 76D DECREE ISSUED 3/22/1984.

LINCOLN COUNTY RECORDS AS OF 3/3/2020 SHOWS PLACE OF USE IS OWNED BY MCCURRY-FAHLGREN FAMILY TRUST.

USDA AERIAL PHOTOGRAPH NO(S). 379-6, DATED 8/10/1979, APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

THE CLAIMED PLACE OF USE DOES NOT APPEAR TO BE USED FOR DOMESTIC IRRIGATION PURPOSES.

THE PRIORITY DATE MAY BE QUESTIONABLE. IT IS UNCLEAR WHETHER THE CLAIMED PRIORITY DATE IS 1920 OR 1950.

VOLUME MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

Issue remarks 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.

Montana law requires the Water Court to resolve issue remarks. Claimant Michael W. McCurry was ordered to meet with DNRC to attempt resolution of the issue remarks. Mr. McCurry failed to complete the issue remark resolution process. The court set a show cause filing deadline for Mr. McCurry.

Issue

What amendments to claim 76D 30121510 should be implemented to accurately reflect historical beneficial use and resolve the issue remarks on the claim?

Findings of fact

1. On January 30, 2024, DNRC filed a Memorandum recommending resolution of the issue remarks.

2. Based upon a review of the claim file and the DNRC's recommendation, an order issued for Mr. McCurry to show cause why the claim should not be amended as recommended by the DNRC to resolve the issue remarks. Mr. McCurry failed to comply with the show cause filing deadline.

3. The historically accurate elements for domestic claim 76D 30121510 should be:

- Priority date: December 31, 1950
- Volume: 1.50 AF
- Maximum acres irrigated: zero.

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. This prima facie proof may be contradicted and 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. If the Montana Water Court cannot resolve issue remarks based upon information in the claim file or information available to the Court, claimants shall be

required to confer with the DNRC to attempt resolution of the issue remarks. Claimants shall file documentation to resolve the issue remarks, and the DNRC shall submit recommendations regarding disposition of the issue remarks. Section 85-2-248(5), MCA.

5. All parties subject to the jurisdiction of the Montana Water Court in this adjudication have the obligation to comply with Orders of this Court, including Orders issued by a Master appointed by the Court. If a claimant fails to comply with an Order issued by the Court in its review of issue remarks, the Court may amend the claim to conform with information found in the claim file and information before the Court. Section 85-2-248(9)(a),(b), MCA.

Analysis

Issue remark resolution

Mr. McCurry was ordered to meet with the DNRC to attempt resolution of the issue remarks. DNRC reported it reviewed the claim file, a 1979 aerial photo, State of Montana property information, and a USGS topographic map for the claimed area.

DNRC recommended a more junior priority date, removal of domestic irrigation from the claim, and a reduced volume. Mr. McCurry failed to file written agreement with the recommendations suggested by DNRC to resolve the issue remarks. An order provided Mr. McCurry the opportunity to respond to the suggested amendments and suggested resolution of the issue remarks. Mr. McCurry did not file a response, leaving DNRC's review and recommendations as strong evidence of actual historical use.

DNRC's Memorandum and its attachments may be viewed on the court's case management system, FullCourt Enterprise, at document sequence 2.00.

The claim appeared in the Preliminary Decree with the following notice issue remarks:

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 76D DECREE ISSUED 03/22/1984.

LINCOLN COUNTY RECORDS AS OF 3/3/2020 SHOWS PLACE OF USE IS OWNED BY MCCURRY-FAHLGREN FAMILY TRUST.

Water users were given the opportunity to review the claim and file an objection.

The deadline to file objections expired. No water users filed an objection to the claim. The ownership issue remark provided notice that ownership of the claim may not be current. The ownership of the claim was not updated.

Conclusions of law

Based upon the claim file, evidence included with DNRC’s Memorandum, and DNRC’s recommendations, domestic claim 76D 30121510 should be amended as suggested to reflect historical use and resolve issue remarks.

The issue remarks noting lack of the claim’s inclusion in the previous Basin 76D decree and noting ownership may not be current served their notice purpose.

Recommendations

Domestic claim 76D 30121510 should be amended as follows to accurately reflect historical use.

<u>PRIORITY DATE:</u>	DECEMBER 31, 1920	DECEMBER 31, 1950
<u>VOLUME:</u>	10.00 AF	1.50 AF
<u>MAXIMUM ACRES:</u>	4.00	
<u>PLACE OF USE:</u>		
	<u>ACRES</u>	<u>GOVT LOT</u>
	<u>QTR SEC</u>	<u>SEC</u>
	<u>TWP</u>	<u>RGE</u>
	<u>COUNTY</u>	
TOTAL:	<u>4.00</u>	<u>19</u>
	<u>4.00</u>	<u>34N</u>
		<u>25W</u>
		<u>LINCOLN</u>

The issue remarks should be removed from the claim abstract.

A Post Decree Abstract of Water Right Claim accompanies this report to confirm implementation of the recommendations in the state’s centralized water right record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail

Michael W McCurry
 PO Box 508
 Trego MT 59934-0508

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

Water Right Number: 76D 30121510 STATEMENT OF CLAIM
Version: 2 -- POST DECREE
Status: ACTIVE

Owners: MICHAEL W MCCURRY
PO BOX 508
TREGO, MT 59934-0508

Priority Date: DECEMBER 31, 1950

Type of Historical Right: USE

Purpose (Use): DOMESTIC

Flow Rate: 12.00 GPM

Volume: 1.50 AC-FT

Households: 1

Source Name: GROUNDWATER

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		SESWNE	19	34N	25W	LINCOLN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

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			SESWNE	19	34N	25W	LINCOLN