

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  
CLARK FORK DIVISION  
KOOTENAI RIVER BASIN (76D)  
PRELIMINARY DECREE

\*\*\*\*\*

CLAIMANTS: Edgar C. Nelson; Kathie L. Phillips; Robert C. Phillips

CASE 76D-0601-R-2024  
76D 17999-00

**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 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**

Irrigation claim 76D 17999-00 appeared in the Preliminary Decree with the following issue remarks.

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.

THE CLAIMED PRIORITY DATE MAY BE QUESTIONABLE. THE PRIORITY DATE ON THE SUBMITTED NOTICE OF APPROPRIATION IS 10/31/1948.

Issue remarks may result from Department of Natural Resources and Conservation (“DNRC”) claims examination. DNRC confirms the historical use of water right claims and identifies issues with claims. If DNRC cannot confirm some aspect of a claim, DNRC adds an issue remark to the claim.

No objections were filed to the claim. Montana law requires the Water Court to resolve issue remarks.

### **Issue**

Are the issue remarks resolved?

### **Finding of fact**

The Preliminary Decree abstract for irrigation claim 76D 17999-00 identifies the historically accurate elements for the claim.

### **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. Prima facie proof may be 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. 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. Section 85-2-248(3), MCA.

5. Judicial notice of facts may be taken from a source “whose accuracy cannot be reasonably questioned.” Rule 201, M.R.Ev.

6. “The date of an appropriation appearing in a water right decree is material only in its relation to the question of priority.” *Vidal v. Kensler*, 100 Mont. 592, 541, 51 P.2d 235, 236 (1935).

## **Analysis**

The priority date issue remark appears to highlight a DNRC claims examination error based upon Rule 13(f)(3)(i) of the Water Right Claim Examination Rules (W.R.C.E.R.). The filed notice of appropriation attached to and in support of the statement of claim identifies the priority date as October 1948. According to Rule 13(f)(3)(i), W.R.C.E.R. when only the month and year are claimed, the priority date will be the last day of the month, here October 31. However, the priority date identified by the statement of claim and Preliminary Decree abstract is October 1, 1948. The claims examiner chose not to modify the priority date based upon the claim examination rule instead placing the priority date issue remark on the claim.

This difference in priority date is irrelevant. Judicial notice is taken of the Preliminary Decree point of diversion index for Basin 76D. Based upon the Preliminary

Decree point of diversion index, claimants are the most junior appropriators on the source, resulting in the relativity of the priority date staying the same whether the priority date is identified as October 1, 1948, or October 31, 1948.

The second issue remark on claim 76D 17999-00 notes the point of diversion was modified by DNRC during claims examination. The issue remark instructed claimants and other water users that if no objections were filed to the element identified by the issue remark, the element would remain as it appeared on the Preliminary Decree abstract. No one objected to the point of diversion.

### **Conclusions of law**

The priority date issue remark and the information resulting in the issue remark does not raise an issue requiring resolution.

The issue remark concerning point of diversion served its notice purpose.

### **Recommendations**

The elements of irrigation claim 76D 17999-00 accurately reflect historical use. No changes to the elements of the claim should be made.

The issue remarks should be removed from the claim abstract.

A Post Decree Abstract of Water Right Claim accompanies this report to confirm removal of the issue remarks in the state's centralized water right record system.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

### **Service via USPS Mail**

Edgar C Nelson  
PO Box 193  
Trego MT 59934

Kathie L Phillips  
Robert C Phillips  
PO Box 297  
Fortine MT 59918-0297

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

**Water Right Number:** 76D 17999-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** EDGAR C NELSON  
PO BOX 193  
TREGO, MT 59934  
  
KATHIE L PHILLIPS  
PO BOX 297  
FORTINE, MT 59918-0297  
  
ROBERT C PHILLIPS  
PO BOX 297  
FORTINE, MT 59918-0297

**Priority Date:** OCTOBER 1, 1948

**Type of Historical Right:** FILED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** SPRINKLER

**Flow Rate:** 250.00 GPM

**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:** 16.00

**Source Name:** MURPHY 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		NENWSE	6	34N	25W	LINCOLN

**Period of Diversion:** MAY 1 TO SEPTEMBER 30

**Diversion Means:** PUMP

**Period of Use:** MAY 1 TO SEPTEMBER 30

**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	7.00		N2NWSE	6	34N	25W	LINCOLN
2	9.00		SWNE	6	34N	25W	LINCOLN

**Total:** 16.00