

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**

\*\*\*\*\*

CLAIMANTS: Allan L. Davies; Judith A. Davies; Radley Family  
Trust

**CASE 41I-0035-R-2023**  
41I 120926-00

**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, 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**

Claim 41I 120926-00 appeared in the Preliminary Decree for the Missouri River above Holter Dam (Basin 41I) issued on June 24, 2022. The claim 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

1. Claim 41I 120926-00 appeared in the Basin 41I Preliminary Decree as a sprinkler/flood irrigation claim for use on a 40.00-acre place of use as follows:

| Place of Use: |              |                 |            |            |            |            |               |
|---------------|--------------|-----------------|------------|------------|------------|------------|---------------|
| <u>ID</u>     | <u>Acres</u> | <u>Govt Lot</u> | <u>Qtr</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
| 1             | 20.00        |                 | SWNW       | 27         | 9N         | 1E         | BROADWATER    |
| 2             | 20.00        |                 | SENE       | 28         | 9N         | 1E         | BROADWATER    |
| <b>Total:</b> | <b>40.00</b> |                 |            |            |            |            |               |

2. The claim received the following issue remark:

A DNRC MEMORANDUM WAS FILED DECEMBER 17, 1997 IN CASE 41I-609 INDICATING THAT PLACE OF USE AND MAXIMUM ACRES MAY BE INCORRECT. THIS WILL BE HEARD AFTER PROPER NOTICE ON THE NEXT OBJECTION LIST.

3. According to the December 17, 1997 memorandum:

The historical use of the water was used on the following parcels, and only parcel one and two were included in the claim.

|     |              |       |      |        |       |       |
|-----|--------------|-------|------|--------|-------|-------|
| 001 | 20.00        | ACRES | SWNW | SEC 27 | T 09N | R 01E |
| 002 | 20.00        | ACRES | SENE | SEC 28 | T 09N | R 01E |
| 003 | 40.00        | ACRES | NWNE | SEC 28 | T 09N | R 01E |
| 004 | 32.00        | ACRES | SWNE | SEC 28 | T 09N | R 01E |
| 005 | 18.00        | ACRES | SENE | SEC 28 | T 09N | R 01E |
| 006 | <u>15.00</u> | ACRES | SWNW | SEC 28 | T 09N | R 01E |
|     | 145.00       | TOTAL |      |        |       |       |

4. During a telephone conference on December 14, 2023, Claimants agreed that the parcels identified by the DNRC accurately reflect the historical use of the claim.

5. The claim also received the following notice-type issue remark:

THE TIMELY FILED OBJECTION OF ALLAN DAVIES WAS AMENDED BY AGREEMENT OF THE PARTIES TO INCLUDE FLOW RATE. BECAUSE THIS ELEMENT WAS NOT INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THIS CHANGE MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

6. This remark served its notice purpose.

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

1. The place of use issue remark overcomes the prima facie status of the claim. The evidence in the claim file shows the historically accurate place of use and maximum acres are as described in Finding of Fact No. 3.

2. The notice-type issue remark served its notice purpose.

### RECOMMENDATIONS

1. The place of use and maximum acres of claim 41I 120926-00 should be modified to:

|     |               |       |                         |
|-----|---------------|-------|-------------------------|
| 001 | 20.00         | ACRES | SWNW SEC 27 T 09N R 01E |
| 002 | 20.00         | ACRES | SENE SEC 28 T 09N R 01E |
| 003 | 40.00         | ACRES | NWNE SEC 28 T 09N R 01E |
| 004 | 32.00         | ACRES | SWNE SEC 28 T 09N R 01E |
| 005 | 18.00         | ACRES | SENE SEC 28 T 09N R 01E |
| 006 | 15.00         | ACRES | SWNW SEC 28 T 09N R 01E |
|     | <u>145.00</u> | TOTAL |                         |

2. The issue remarks should be removed from the claim abstract.

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

**ELECTRONICALLY SIGNED AND DATED BELOW.**

**Service via USPS Mail**

Davies, Allan L  
Davies, Judith A  
465 Beaver Creek Rd  
Winston, MT 59647

Radley Family Trust  
%Tyson R O'connell  
131 S Higgins Ave Ste P1  
Missoula, MT 59802

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

**Water Right Number:** 411 120926-00 STATEMENT OF CLAIM

**Version:** 4 -- POST DECREE

**Status:** ACTIVE

**Owners:**

ALLAN L DAVIES  
465 BEAVER CREEK RD  
WINSTON, MT 59647 8304

JUDITH A DAVIES  
465 BEAVER CREEK RD  
WINSTON, MT 59647 8304

RADLEY FAMILY TRUST  
%TYSON R O'CONNELL  
131 S HIGGINS AVE STE P1  
MISSOULA, MT 59802

**Priority Date:** MAY 1, 1871

**Type of Historical Right:** DECREED

**Purpose (use):** IRRIGATION

**Irrigation Type:** SPRINKLER/FLOOD

**\*Flow Rate:** 1.50 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:** 145.00

**Source Name:** BEAVER 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         |                 | SWSENE         | 29         | 9N         | 1E         | BROADWATER    |

**\*Period of Diversion:** APRIL 15 TO OCTOBER 15

**Diversion Means:** HEADGATE

**Ditch Name:** HANSEN-DAVIES 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         | 20.00        |                 | SWNW           | 27         | 9N         | 1E         | BROADWATER    |
| 2         | 20.00        |                 | SENE           | 28         | 9N         | 1E         | BROADWATER    |
| 3         | 40.00        |                 | NWNE           | 28         | 9N         | 1E         | BROADWATER    |
| 4         | 32.00        |                 | SWNE           | 28         | 9N         | 1E         | BROADWATER    |
| 5         | 18.00        |                 | SENW           | 28         | 9N         | 1E         | BROADWATER    |

|               |              |  |  |  |  |  |  |  |  |
|---------------|--------------|--|--|--|--|--|--|--|--|
| 6             | <u>15.00</u> |  |  |  |  |  |  |  |  |
| <b>Total:</b> | 145.00       |  |  |  |  |  |  |  |  |

SWNW 28 9N 1E BROADWATER

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**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.

120925-00      120926-00      120929-00