

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; Davies Family
Trust

CASE 41I-0036-R-2023
41I 120924-00
41I 120927-00

OBJECTOR: Allan L. Davies

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. Claim 41I 120927-00

received a self-objection from Allan Davies. All of 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 120924-00

1. Claim 41I 120924-00 appeared in the Basin 41I Preliminary Decree as a sprinkler/flood irrigation claim. The claim is based on an April 15, 1872 decreed right for 2.50 CFS.

2. The claim received the following issue remark:

THE CLAIMED FLOW RATE EXCEEDS THE 17 GPM PER ACRE GUIDELINE AND CANNOT BE CONFIRMED DUE TO LACK OF DATA. THE FLOW RATE EQUALS 19.00 GPM PER ACRE.

3. The 2.50 CFS flow rate was decreed by a previous district court case and there is no evidence supporting the issue remark.

4. Claim 41I 120924-00 also received a notice-type issue remark regarding the source name. This remark served its notice purpose and should be removed from the claim.

41I 120927-00

5. Claim 41I 120927-00 appeared in the Basin 41I Preliminary Decree as a sprinkler/flood irrigation claim that diverts water from Antelope Creek. The source name was decreed with the following information remark:

THE WATER COURSES OF BEAVER CREEK WAS POTENTIALLY CHANGED BY THE FLOODS OF 1948, WHICH ALSO CHANGED THE COURSE OF WHAT WAS HISTORICALLY KNOWN AS HOBSON DITCH, SAID TRIBUTARY OF BEAVER CREEK IN THE DECREE (CASE 208). THIS RESULTED IN THE TRIBUTARY BEING POTENTIALLY NAMED ANTELOPE CREEK FROM THAT TIME FORWARD.

6. Allan Davies objected to the claim, stating the source name should be Beaver Creek, not Antelope Creek. The claim received an issue remark stating the source name had been modified during reexamination.

7. The source name was originally claimed as Beaver Creek. During reexamination, the DNRC modified the source name to Antelope Creek.

8. The Court ordered Claimant to work with the DNRC to resolve the source issue remark on claim 41I 120927-00.

9. DNRC Water Resource Specialist Allison Calkins met with Allan Davies and filed a memorandum summarizing her findings. (Doc.¹ 2.00).

10. The disagreement between Mr. Davies and the DNRC's reexamination regarding the source name stems from flooding in 1948 and whether it altered the course of Beaver Creek and its surrounding tributaries.

11. Mr. Davies holds that the source name should remain Beaver Creek because the 1948 flooding did not impact the Beaver Creek flow lines significantly enough to constitute a source name change for claim 41I 120927-00.

12. The 1956 Broadwater County Water Resource Survey maps and names Beaver Creek flow lines as they existed pre-1948 flooding.

13. Ms. Calkins found the following information during her research on the claim:

Little to no information regarding the specific impacts of the 1948 flooding could be found. However, when comparing the 1948 White Sulphur Springs USA Topographic Map to the 1950 Townsend USA Topographic Map, it is clear that USGS modified the flow line after Beaver Creek crosses the highway (*Attachment 3*). The 1950 USA Topo map, and all USA Topo maps from that year on, depict Beaver Creek jutting to the East directly after it passes under the highway whereas the 1948 USA Topo map and the 1956 Broadwater County WRS depict the flowline to continue northeast after passing under the highway.

14. Mr. Davies is best situated to resolve the conflicting source name information from the various maps. Ms. Calkins agreed and recommended the source name be modified to Beaver Creek.

15. Ms. Calkins also recommended that an information remark explaining the source name conflict be placed on the claim. Ms. Calkins recommended the following remark:

SOURCE IS ALSO KNOWN AS ANTELOPE CREEK.
THE COURSE OF BEAVER CREEK WAS
ALLEGEDLY ALTERED BY THE FLOODS OF 1948
RESULTING IN A PORTION OF BEAVER CREEK TO
BE NAMED ANTELOPE CREEK ON USA TOPO MAPS
STARTING IN 1950.

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.

¹ "Doc." numerical references correlate to case file docket numbers in the Water Court's Full Court case management system.

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.

8. The party seeking to overcome the prima facie status of a Statement of Claim bears the burden of proof; this burden also applies to a claimant’s objection to his own claim. *Nelson v. Brooks*, 2014 MT 120, ¶¶ 34, 37, 375 Mont. 86, 329 P.3d 558.

CONCLUSIONS OF LAW

41I 120924-00

1. The flow rate issue remark does not overcome the prima facie status of claim 41I 120924-00. The flow rate was decreed by a previous district court case and there is no evidence supporting the issue remark.

2. The notice-type issue remark served its notice purpose and should be removed from the claim.

41I 120927-00

3. Mr. Davies’s objection overcomes the prima facie status of claim 41I 120927-00. The evidence in the claim file and the DNRC memorandum show the source name for claim 41I 120927-00 is Beaver Creek. Although a source name information remark is appropriate, much of the text provided by Ms. Calkins is unnecessary. The following source name information remark should be added to the claim:

SN: ALSO KNOWN AS ANTELOPE CREEK

RECOMMENDATIONS

1. The source name for claim 41I 120927-00 should be changed to Beaver Creek. “Also known as Antelope Creek” should also be added as a source name information remark.

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

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

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail

Davies Family Trust
Allan L & Judith A Davies Trustees
Allan L Davies
Judith A. Davies
465 Beaver Creek Rd
Winston, MT 59647-8304

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

Water Right Number: 41I 120924-00 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

DAVIES FAMILY TRUST
ALLAN L & JUDITH A DAVIES TRUSTEES
465 BEAVER CREEK RD
WINSTON, MT 59647-8304

Priority Date: APRIL 15, 1872

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER/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: 58.00

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		SESWNE	30	9N	1E	BROADWATER

***Period of Diversion:** APRIL 15 TO OCTOBER 19

Diversion Means: HEADGATE

Ditch Name: DAVIES DITCH

***Period of Use:** APRIL 15 TO OCTOBER 19

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	23.00		SESE	21	9N	1E	BROADWATER
2	22.50		SWSE	21	9N	1E	BROADWATER
3	12.50		N2NENE	28	9N	1E	BROADWATER

Total: 58.00

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.

120923-00

120924-00

120927-00

120928-00

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

Water Right Number: 41I 120927-00 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

DAVIES FAMILY TRUST
ALLAN L & JUDITH A DAVIES TRUSTEES
465 BEAVER CREEK RD
WINSTON, MT 59647-8304

Priority Date: MAY 1, 1866

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER/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:** 169.00

Source Name: BEAVER CREEK

Source Type: SURFACE WATER

ALSO KNOWN AS ANTELOPE CREEK

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	30	9N	1E	BROADWATER

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

Diversion Means: HEADGATE

Ditch Name: 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	37.00		E2SE	21	9N	1E	BROADWATER
2	25.00		SWSE	21	9N	1E	BROADWATER
3	7.00		S2NW	22	9N	1E	BROADWATER
4	56.00		N2SW	22	9N	1E	BROADWATER

5	25.00	SWSW	22	9N	1E	BROADWATER
6	4.00	NWNWNW	27	9N	1E	BROADWATER
7	15.00	N2NENE	28	9N	1E	BROADWATER
Total:	<u>169.00</u>					

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.

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