

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

CLAIMANT: Gordon R. Sullivan

CASE 76D-0574-R-2024
76D 216085-00

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 to 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

Fish and wildlife claim 76D 216085-00 appeared in the Preliminary Decree for this Basin with the following issue remarks:

THE CAPACITY OF THE DIVERSION AND CONVEYANCE SYSTEM CANNOT BE DETERMINED AND THE FLOW RATE REMAINS AS ORIGINALLY CLAIMED. THE CLAIMED FLOW RATE CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE FLOW RATE WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

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

CLAIM FILED LATE 06/28/96. IN ADDITION TO BEING SUBORDINATE TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW, THIS RIGHT MAY ALSO BE SUBORDINATE TO CERTAIN PERMITS AND RESERVATIONS OF WATER. SEE SECTION 85-2-221 MCA.

THE CLAIMANT DID NOT IDENTIFY THE PERIOD OF DIVERSION FOR THIS RIGHT. A PERIOD OF DIVERSION HAS BEEN ADDED TO MATCH THE PERIOD OF USE. IF NO OBJECTIONS ARE RECEIVED TO THE PERIOD OF DIVERSION OR PERIOD OF USE, THOSE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS ISSUE REMARK WILL BE REMOVED FROM THIS CLAIM.

EXISTENCE OF THE CLAIMED RESERVOIR CANNOT BE CONFIRMED WITH AVAILABLE DATA.

CLAIMED VOLUME EXCEEDS CAPACITY OF RESERVOIR PLUS EVAPORATIVE LOSSES. THE CLAIMED VOLUME CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE VOLUME WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM. THE CLAIMED VOLUME EXCEEDS THE MAXIMUM FEASIBLE VOLUME.

BASED ON THE FLOW RATE AND PERIOD OF USE, THE MAXIMUM VOLUME POSSIBLE IS 18 ACRE-FEET PER YEAR.

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 Gordon R. Sullivan completed the issue remark resolution process.

Issue

Are the issue remarks resolved?

Findings of fact

1. On May 13, 2024, DNRC filed a Memorandum concerning Gordon R. Sullivan's attempt at resolution of the issue remarks. DNRC reported the issue remarks were resolved.

2. Gordon R. Sullivan agreed with DNRC that fish and wildlife claim 76D 216085-00 should be modified as follows:

- Storage is not part of the system – the system is a direct flow system quantified by flow rate and volume, and
- Volume should be reduced to 437.00 AF.

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. Settlement, including the documents filed by a claimant where the claimant is the only party, is subject to review and approval by the Water Court. Rule 17(a), W.R.Adj.R.

4. The Montana Water Court may accept a settlement agreement that reduces or

limits an element of a claim and need not determine whether the burden of proof is met unless there is an unresolved issue remark on the claim. Rule 17(c), W.R.Adj.R.

5. 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.

6. 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.

7. 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.

8. Late claim fees may be waived by the court. Rule 30, W.R.Adj.R.

Analysis

Issue remark resolution

DNRC reviewed the claim file and visited with Mr. Sullivan. Mr. Sullivan confirmed three small ponds on his property with a total estimated capacity of 0.19 AF. Based upon the prima facie flow rate of 400.00 GPM and the prima facie period of use claimed by statement of claim 76D 216085-00, the historical volume for the claim is 437.00 AF.¹ Statement of claim 76D 216085-00 claimed a volume of 27,101.25 AF. Comparing the smaller of the two volumes to the capacity of the ponds - the 437.00 AF to the 0.19 AF capacity of the ponds - indicates that the ponds associated with fish and wildlife claim 76D 216085-00 are incidental providing no storage component to the

¹ The volume issue remark identifying a maximum feasible volume of 18.00 AF included a mathematical error. The DNRC Memorandum states the formula used by the claims examiner “eliminated the mathematical conversions between minutes to hours and hours to days resulting in a significant under estimation of the maximum volume...(18 af vs. 437 af).” See equation Chapter X.C.2.d. of the May 2013 DNRC Water Rights Claim Examination Manual.

system.² This fish and wildlife claim is primarily a direct flow system. Direct flow fish and wildlife claims are quantified by both flow rate and volume.³ The DNRC recommends removal of the issue remarks based upon the above analysis and Mr. Sullivan's agreement with the proposed reduced volume.

The DNRC 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 issue remarks concerning its lack of inclusion in the previous Basin 76D decree, its late claim status, flow rate, and period of diversion. These issue remarks provided water users the opportunity to review the claim and file an objection. Claim 76D 216085-00 was filed after the April 30, 1982 claim filing deadline expired. As a result, the claim is defined as a "late claim" under § 85-2-102(15), MCA, and was deemed forfeit pursuant to § 85-2-226, MCA. In 1993, the Montana Legislature enacted § 85-2-221(3), MCA, and provided for the remission of forfeiture of late claims, subject to specified terms and conditions. This claim is a "remitted" late claim. The abstract of this claim appeared with an issue remark citing § 85-2-221(3), MCA, advising water users that the claim may be subordinate, and therefore junior, to certain permits and reservations of water. Persons holding a post-June 30, 1973 permit or reservation, who relied to their detriment on the failure of a claimant to timely file a claim, were required to file an objection and thereby seek the subordination of any remitted late filed claim to their permit or reservation. The deadline to file objections expired. No water users filed an objection to the claim.

Conclusions of law

Mr. Sullivan's explanation of the system confirms a direct flow system and Mr. Sullivan's proposed modification to the volume is a reduction within the parameters of

² Chapter X.C. of the May 2013 DNRC Water Rights Claim Examination Manual refers the claims examiner to the irrigation chapter for guidance on examining flow rate and volume for fish and wildlife claims. Irrigation Chapter VII.B.3.a. discusses a method to determine if a claim uses other than stored water. The claims examiner compares the claimed volume to a calculated volume and then compares the smaller of these two volumes to the capacity of the reservoir. If the smaller volume is greater than 2 times the capacity of the reservoir, the claim could be considered primarily a direct flow system.

³ Rule 29(b)(1)(i)-(ii), Water Right Claim Examination Rules.

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

Water Right Number: 76D 216085-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Late Claim: B

Owners: GORDON R SULLIVAN
P.O BOX 1624
LIBBY, MT 59923

Priority Date: JUNE 30, 1968

Enforceable Priority Date: JUNE 30, 1973

CLAIM FILED LATE 06/28/96. AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

Type of Historical Right: USE

Purpose (Use): FISH AND WILDLIFE

Flow Rate: 400.00 GPM

Volume: 437.00 AC-FT

Source Name: PARMENTER 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		SWNESE	5	30N	31W	LINCOLN

Period of Diversion: MARCH 15 TO NOVEMBER 15

Diversion Means: HEADGATE

Period of Use: MARCH 15 TO NOVEMBER 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			NESWSW	4	30N	31W	LINCOLN