

Montana Water Court  
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IN THE WATER COURT OF THE STATE OF MONTANA  
LOWER MISSOURI DIVISION  
MISSOURI RIVER BELOW FORT PECK DAM BASIN (40S)  
INTERLOCUTORY DECREE

\* \* \* \* \*

CLAIMANT: Thomas D. Nelson

**CASE 40S-0027-I-2024**

40S 30116248

**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

Water right claim 40S 30116248 appeared in the Interlocutory Decree for the Lower Missouri River, Below Fort Peck Dam (Basin 40S) issued on July 20, 2023. All claims that appeared in the Interlocutory Decree were subject to “issue remarks” resulting from pre-decree examination by the Montana Department of Natural Resources and Conservation (“DNRC”), objections, counterobjections, and notices of intent to appear. 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.

Claim 40S 30116248 received issue remarks, but not any objections, counterobjections, or notices of intent to appear. To address the issue remarks, it is ORDERED claim 40S 30116248 is consolidated into Water Court Case 40S-0027-I-2024.

### FINDINGS OF FACT

1. Claim 40S 30116248 is a stockwater right from an unnamed tributary of Clover Creek with a place of use in the E2SESW of Section 18, T28N, R57E, Roosevelt County.

2. The claim received the following substantive issue remark from the DNRC:  
A PORTION OF THE CLAIMED POINT OF DIVERSION AND PLACE OF USE DOES NOT MEET THE DEFINITION OF AN EXEMPT RIGHT UNDER 85-2-222, MCA, AND INVOLVES AN ON-STREAM RESERVOIR.

3. The issue remark questions whether claim 40S 30116248 meets the statutory definition of an exempt claim. In the context of this case, an exempt claim is an existing right for stock water based on instream use with no man-made diversion or based on a groundwater source. Section 85-2-222(1), MCA.

4. The DNRC placed the issue remark on the claim because a reservoir is located within the claimed place of use. The DNRC located this reservoir on aerial photographs during examination of the claim.

5. Claims for stock use from a reservoir are not exempt because reservoirs utilize man-made diversions to store water.

6. Based on the evidence before the Court, it does not appear the reservoir is claimed for claim 40S 30116248. The statement of claim form filed by the Claimant on July 3, 2017, does not claim the reservoir. Additionally, the map attached to the statement of claim does not mark the reservoir. The Interlocutory Decree abstract for the claim does not contain a reservoir record and Claimant did not self-object to add a reservoir to the claim.

7. The remaining issue remark placed on the claim is for notice purposes only.

#### CONCLUSIONS OF LAW

1. A properly filed claim of an existing right or an amended claim of existing right is *prima facie* proof of its content. § 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 the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

2. The degree or weight of evidence needed to contradict or overcome the *prima facie* proof statute is a preponderance of the evidence. *Burkhartsmeier et al. v. Burkhartsmeier et al.*, Case 40G-2, (MT Water Court Memorandum Opinion and Order Adopting Master's Report, Mar. 11, 1997). The Montana Supreme Court has defined preponderance as "a relatively modest standard that the statutory criteria are 'more probable than not' to have been met." *Hohenlohe v. State*, 2010 MT 203 ¶ 33, 357 Mont. 438, 240 P.3d 628.

3. 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.

4. Section 85-2-248(2), MCA requires the Water Court to resolve all issue remarks that are not resolved through the objection process.

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. § 85-2-248(3), MCA.

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. Though there is a reservoir within the claimed place of use, Claimant did not claim the reservoir or object to the claim to add the reservoir. Further, the DNRC failed to provide any evidence that the reservoir is actually part of the claim. The issue remark should therefore be removed for failing to prove by a preponderance of the evidence that the claim does not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973.

7. The remaining issue remark has served its purpose of providing notice that the claim did not appear in the Basin 40S Preliminary Decree and should be removed.

#### RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends the Court make the changes specified above.

A Post Decree Abstract of Water Right Claim 40S 30116248 is served with this Master's Report to confirm the recommendations have been made in the state's centralized record system.

#### **ELECTRONICALLY SIGNED AND DATED BELOW.**

##### Service via USPS Mail:

Thomas D. Nelson  
PO Box 151  
Culbertson, MT 59218-0151

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**MISSOURI RIVER, BELOW FORT PECK DAM**  
**BASIN 40S**

**Water Right Number:** **40S 30116248 STATEMENT OF CLAIM**

**Version:** 2 -- POST DECREE

**Status:** ACTIVE

**Owners:**  
THOMAS D NELSON  
PO BOX 151  
CULBERTSON, MT 59218-0151

**\*Priority Date:** DECEMBER 31, 1932

**Type of Historical Right:** USE

**Purpose (Use):** STOCK

**\*Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

**\*Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

**\*Source Name:** UNNAMED TRIBUTARY OF CLOVER 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		E2SESW	18	28N	57E	ROOSEVELT

**\*Period of Diversion:** JUNE 1 TO SEPTEMBER 30

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

**\*Period of Use:** JUNE 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			E2SESW	18	28N	57E	ROOSEVELT