

Montana Water Court
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FILED
10/23/2024
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
41S-0605-R-2024
Stern, Anika
5.00

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
JUDITH RIVER BASIN (41S)
PRELIMINARY DECREE

CLAIMANT: Michael R. Bourke

CASE 41S-0605-R-2024
41S 10573-00
41S 16500-00
41S 16501-00
41S 16502-00

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

FINDINGS OF FACT

1. Michael R. Bourke (Bourke) is the record owner of claims 41S 10573-00, 41S 16500-00, 41S 16501-00, and 41S 16502-00.

2. Claims 41S 10573-00, 41S 16500-00, 41S 16501-00, and 41S 16502-00 were decreed with DNRC issue remarks:

Claim 41S 10573-00:

- THE CLAIMS LISTED FOLLOWING THIS STATEMENT MAY BE A MULTIPLE USE OF THE SAME RIGHT. THESE CLAIMS MAY NEED A MULTIPLE USE REMARK. 41S 10573-00, 41S 16501-00.

Claim 41S 16500-00:

- MEANS 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.

Claim 41S 16501-00:

- FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.
- THE CLAIMS LISTED FOLLOWING THIS STATEMENT MAY BE A MULTIPLE USE OF THE SAME RIGHT. THESE CLAIMS MAY NEED A MULTIPLE USE REMARK. 41S 10573-00, 41S 16501-00.
- THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE HEADGATE CANNOT BE IDENTIFIED FROM AVAILABLE DATA.
- THE JUDITH BASIN COUNTY WATER RESOURCES SURVEY (1963) APPEARS TO INDICATE 0.00 ACRES IRRIGATED.
- USDA AERIAL PHOTOGRAPH NO(S). 30045-179-167 , DATED 09/17/1979 , APPEARS TO INDICATE 30.70 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

Claim 41S 16502-00:

- FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.
- THE DNRC MEMORANDUM FILED ON 11/30/2005 STATES THAT AN ONSTREAM RESERVOIR IN THE NWSWSW SEC 11, TWP 15N, RGE 14E JUDITH BASIN CO SHOULD BE ADDED TO THE POINT OF DIVERSION. THIS WILL BE HEARD AFTER PROPER NOTICE ON THE NEXT OBJECTION LIST.
- THE JUDITH BASIN COUNTY WATER RESOURCES SURVEY (1963) APPEARS TO INDICATE 0.00 ACRES IRRIGATED.
- USDA AERIAL PHOTOGRAPH NO(S). 30045-179-169 , DATED 09/17/1979 , APPEARS TO INDICATE 14.20 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

3. Bourke was ordered to meet with the DNRC to address unresolved issue remarks. (Doc.¹1.00).

4. DNRC Water Resource Specialist Carli Bluhm filed a Memorandum stating the Claimant failed to contact the DNRC. (Doc.² 3.00). Ms. Bluhm indicated she reviewed abstracts, scanned claim files, aerial photos, and the Judith Basin Water

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

Resources Survey aerial images and field notes. Maps and proposed abstracts were attached to the Memorandum.

5. **41S 10573-00:** Ms. Bluhm confirmed that consistent with the multiple-use information remark decreed on claims 41S 10573-00 and 41S 16501-00, the claims are multiple uses and she recommended removing the multiple-use issue remark.

6. **41S 16501-00:** As noted for claim 41S 10573-00, Ms. Bluhm recommended the multiple-use issue remark be removed from this claim.

Ms. Bluhm also confirmed the decreed point of diversion and indicated the point of diversion issue remark should be removed with no modification to the element.

Ms. Bluhm indicated that the DNRC found “a maximum of 31.70 acres of irrigation” and recommended the following modifications be made to claim 41S 16501-00:

Flow Rate: 1.20 CFS ~~2.31 CFS~~

Maximum Acres: 31.70 ~~64.00~~

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	16.00		NESW	10	15N	14E	JUDITH BASIN
2	15.70 16.00		N2SE	10	15N	14E	JUDITH BASIN
Total:	64.00						

Total: 31.70 ~~64.00~~

7. **41S 16502-00:** Ms. Bluhm confirmed the claimed irrigated acres for claim 41S 16502-00. Ms. Bluhm recommended the means of diversion be modified to:

Diversion Means: HEADGATE DAM

Reservoir Record:
Depth: 9.00 ft
Acres: 3.00
Capacity: 10.80 AC-FT

8. To determine if Claimant Michael R. Bourke agreed or disagreed with Ms. Bluhm’s recommendations, an Order setting a deadline for the Claimant to agree or disagree with the changes recommended by Ms. Bluhm was issued. The Order indicated that if nothing were filed by the deadline, this Water Master would conclude the Claimant

agreed with the recommended changes. The following language was included in the Order:

Failure to comply with the terms of this Order may result in sanctions, up to and including entry of default and termination of a water right claim or dismissal of objections. Rule 22, W.R.Adj.R.

Nothing was filed.

PRINCIPLES AND CONCLUSIONS OF LAW

1. The Water Court must address all issue remarks decreed on a claim.

Section 85-2-248, MCA.

2. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie validity may be overcome by evidence showing that one or more elements of the claim are incorrect. This standard of proof applies to objectors or claimants objecting to their own water right claims. Rule 19, W.R.Adj.R., *Nelson v. Brooks*, 2014 MT 120; 375 Mont.86, 95; 329 P.3d 558, 564.

3. The means of diversion issue remark decreed on claim 41S 16500-00 is a notice-type remark and provided notice of an opportunity to object to the claim. No objections were filed, and no further proceedings are required.

RECOMMENDATIONS

1. The following modifications should be made to the claims in this Case:

- **Claim 41S 10573-00:**
No changes to elements.
- **Claim 41S 16500-00:**
No changes to elements.
- **Claim 41S 16501-00:**

Flow Rate: 1.20 CFS 2.31 CFS

Maximum Acres: 31.70 64.00

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	16.00		NESW	10	15N	14E	JUDITH BASIN
2	15.70 16.00		N2SE	10	15N	14E	JUDITH BASIN
Total:	64.00						
		31.70					

- **Claim 41S 16502-00:**

Diversion Means: HEADGATE DAM

Reservoir Record:
Depth: 9.00 ft
Acres: 3.00
Capacity: 10.80 AC-FT

2. The issue remarks should be removed from claims 41S 10573-00, 41S 16500-00, 41S 16501-00, and 41S 16502-00.

Abstracts are attached for review.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Michael R. Bourke
503 E Broadway St
Lewistown, MT 59457

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
JUDITH RIVER
BASIN 41S**

Water Right Number: 41S 10573-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: MICHAEL R BOURKE
503 E BROADWAY ST
LEWISTOWN, MT 59457

Priority Date: APRIL 30, 1903

Type of Historical Right: FILED

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: LOUSE 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		N2S2	10	15N	14E	JUDITH BASIN

Period of Diversion: OCTOBER 1 TO FEBRUARY 29

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: OCTOBER 1 TO FEBRUARY 29

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			N2S2	10	15N	14E	JUDITH BASIN

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

10573-00 16501-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
JUDITH RIVER
BASIN 41S**

Water Right Number: 41S 16500-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: MICHAEL R BOURKE
503 E BROADWAY ST
LEWISTOWN, MT 59457

Priority Date: DECEMBER 31, 1954

Type of Historical Right: USE

Purpose (Use): STOCK

***Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR. 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 LOUSE 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		NWSWSW	11	15N	14E	JUDITH BASIN

***Period of Diversion:** JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM **Reservoir Name:** BOURKE RESERVOIR

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NWSWSW	11	15N	14E	JUDITH BASIN

Diversion to Reservoir: DIVERSION # 1

Period of Use: OCTOBER 1 TO FEBRUARY 29

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			NWSWSW	11	15N	14E	JUDITH BASIN

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
JUDITH RIVER
BASIN 41S**

Water Right Number: 41S 16501-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: MICHAEL R BOURKE
503 E BROADWAY ST
LEWISTOWN, MT 59457

Priority Date: APRIL 30, 1903

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 1.20 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: 31.70

Source Name: LOUSE 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		NWNE SW	10	15N	14E	JUDITH BASIN

Period of Diversion: APRIL 1 TO SEPTEMBER 30

Diversion Means: HEADGATE

Period of Use: APRIL 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	16.00		NESW	10	15N	14E	JUDITH BASIN
2	15.70		N2SE	10	15N	14E	JUDITH BASIN

Total: 31.70

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

10573-00 16501-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
JUDITH RIVER
BASIN 41S**

Water Right Number: 41S 16502-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: MICHAEL R BOURKE
503 E BROADWAY ST
LEWISTOWN, MT 59457

Priority Date: DECEMBER 31, 1954

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 1.25 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: 33.00

Source Name: SPRING, UNNAMED TRIBUTARY OF LOUSE CREEK

Source Type: GROUNDWATER

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		NWSWSW	11	15N	14E	JUDITH BASIN

Period of Diversion: APRIL 1 TO SEPTEMBER 30

Diversion Means: DAM

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NWSWSW	11	15N	14E	JUDITH BASIN

Diversion to Reservoir: DIVERSION # 1

Depth: 9.00 FEET

Surface Area: 3.00 ACRES

Capacity: 10.80 ACRE-FEET

Period of Use: APRIL 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	13.00		NESW	11	15N	14E	JUDITH BASIN
2	15.00		NWSW	11	15N	14E	JUDITH BASIN
3	5.00		SWSW	11	15N	14E	JUDITH BASIN
Total:	33.00						

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

16502-00

16503-00