

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
TWO MEDICINE RIVER - BASIN 41M
INTERLOCUTORY DECREE

* * * * *

CLAIMANT: Donna Caruso-Hirst Revocable Trust

OBJECTORS: Donna M. Caruso-Hirst; Blackfeet Tribe; United
States of America (Bureau of Indian Affairs)

ON MOTION OF THE MONTANA WATER COURT

CASE 41M-0005-I-2024

41M 30120776

41M 30120777

41M 30120778

41M 30120779

41M 30120781

41M 30120782

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

Statement of the case

Domestic claims 41M 30120776, 41M 30120777, 41M 30120778, and 41M 30120779 and stock claims 41M 30120781 and 41M 30120782 received the following notice issue remark.

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 41M DECREE ISSUED 03/20/2015.

The United States of America (Bureau of Indian Affairs) (“BIA”) and the Blackfeet Tribe filed objections to each claim. The BIA and Blackfeet Tribe objected to all elements of claims 41M 30120776 and 41M 30120778 stating the claims have a post-1973 priority date so they cannot be adjudicated. The BIA and Blackfeet Tribe filed objections to all elements of claims 41M 30120777, 41M 30120779, 41M 30120781, and 41M 30120782 stating the claimed priority date is prior to when the land to which the claims are appurtenant left trust status and state-based water rights could only have been perfected after the land left trust status. For domestic claim 41M 30120779 the objections also state, “Aerial photos show no structure to support domestic use,” thereby raising the issues of abandonment and nonperfection.

Donna Caruso-Hirst filed an objection to the priority date and type of historical right for domestic claims 41M 30120776 and 41M 30120778. Ms. Caruso -Hirst stated she would like the 1961 Ground Water Code not to apply to these claims because it was not possible to file a claim pursuant to the 1961 Ground Water Code because the land to which the claims are appurtenant was held in trust until 2004/2005.

The captioned claims were originally in cases 41M-0005-I-2024 and 41M-0006-I-2024. The captioned claims involved the same underlying historical basis for the claims (the same attachment was filed in support of each statement of claim), the same legal questions, and the same parties. The claims were consolidated into two separate cases due to Ms. Caruso-Hirst’s self-objection to claims 41M 30120776 and 41M 30120778.

The Blackfeet Tribe and the BIA unconditionally withdrew their objections in Case 41M-0005-I-2024, prompting the court to call the claims in on motion and prompting the issuance of an Order Setting Show Cause Filing Deadline for claimant to

Show Cause why Montana state water law should apply to claims located on land held in trust by the United States on behalf of the Blackfeet Tribe until 2004/2005. Claimant filed a Brief in Support of Jurisdiction in Case 41M-0005-I-2024 and a Brief in Support of Motion to Stay proceedings for Case 41M-0006-I-2024 pending a decision in Case 41M-0005-I-2024. The Blackfeet Tribe and the BIA filed a Joint Response to Claimant's Motion to Stay in Case 41M-0006-I-2024, agreeing with the request to stay proceedings in Case 41M-0006-I-2024 predicated upon their ability to file a response brief in Case 41M-0005-I-2024. The court equated the Blackfeet Tribe's and the BIA's filing to a request to reinstate their objections to claims 41M 30120776 and 41M 30120778 in Case 41M-0005-I-2024.

On December 18, 2024, to keep motions for a particular case in that case, the court requested that the Blackfeet Tribe and the United States of America (Bureau of Indian Affairs) file their motion to once again participate in Case 41M-0005-I-2024 in that case. No motion was filed in Case 41M-0005-I-2024.

Given that the captioned claims identified the same underlying historical basis, involved the same legal questions and the same parties, and no final decision had been issued in Case 41M-0005-I-2024, to provide consistent proceedings for the captioned claims and in the interests of judicial economy, it was ordered that the claims in case 41M-0006-I-2024 be reconsolidated into case 41M-0005-I-2024 and that case 41M-0006-I-2024 be closed

Following the reconsolidation of case 41M-0005-I-2024, the court set a response brief deadline for the Blackfeet Tribe and the BIA, and a reply brief deadline for the Donna Caruso-Hirst Revocable Trust. The parties submitted their respective briefs, the issue has been fully briefed, and this Master will make a recommendation to the Water Judge based upon the record.

Issues

1. Does the court have jurisdiction over domestic claims 41M 30120776, 41M 30120777, 41M 30120778, and 41M 30120779 and stock claims 41M 30120781 and 41M 30120782?
 - a. Are the claims existing state-based water rights?
 - b. If the claims were *Walton* rights, do the terms of the Blackfeet Tribe-Montana-United States Compact (“Blackfeet Compact”) provide for inclusion of *Walton* rights in Montana Water Court decrees?
2. Should domestic claims 41M 30120776, 41M 30120777, 41M 30120778, and 41M 30120779 and stock claims 41M 30120781 and 41M 30120782 be dismissed from the adjudication?

Findings of fact

1. The court does not have jurisdiction over domestic claims 41M 30120776, 41M 30120777, 41M 30120778, and 41M 30120779 and stock claims 41M 30120781 and 41M 30120782.
 - 1a. Domestic claims 41M 30120776, 41M 30120777, 41M 30120778, and 41M 30120779 and stock claims 41M 30120781 and 41M 30120782 are not existing historical water rights.
 - 1b. The court declines to analyze whether domestic claims 41M 30120776, 41M 30120777, 41M 30120778, and 41M 30120779 and stock claims 41M 30120781 and 41M 30120782 fulfill the requirements of *Walton* rights. Even if the claims were proven to be *Walton* rights, *Walton* rights within the Blackfeet Reservation boundaries are not included in Montana Water Court decrees. Only those claims that may be enforced by the State of Montana pursuant to the terms of the Blackfeet Compact are included in Montana Water Court decrees.
2. Domestic claims 41M 30120776, 41M 30120777, 41M 30120778, and 41M 30120779 and stock claims 41M 30120781 and 41M 30120782 should be dismissed from the adjudication.

Principles of law

1. “‘Existing right’ or ‘existing water right’ means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973.” Section 85-2-102(13), MCA; *E.g. Hoon v. Murphy*, 2020 MT 50; ¶ 34, 399 Mont. 110, 460 P.3d 849.

2. The Montana Water Court has jurisdiction over all matters relating to the determination of existing water rights. Section 3-7-224, MCA.

3. A properly filed Statement of Claim for Existing Water Right or an amended claim for Existing Water Right is prima facie proof of its content. Section 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 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.

4. 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.

5. Pursuant to § 85-2-227(2), MCA:

A water judge may consider all relevant evidence in the determination and interpretation of existing water rights. Relevant evidence under this part may include admissible evidence arising before or after July 1, 1973.

6. *Winters v. U.S.*, 207 U.S. 564, 28 S. Ct. 207 (1908), first acknowledged that Indian tribes and reservations have federal reserved water rights. When the Indians reserved land, the reservation necessarily included the resources to make it a homeland (to serve the purposes of the reservation). The reservation of resources included water. *Winters*, 207 U.S. at 575-577, 28 S. Ct. at 211-212; *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46-47 (9th Cir. 1981).

7. Water rights appurtenant to Indian trust property are defined by federal law. *Ariz. v. San Carlos Apache Tribe*, 463 U.S. 545, 571, 103 S. Ct. 3201, 3216 (1983). State courts must apply federal law to Indian reserved water rights. *State ex rel. Greely v. Confederated Salish and Kootenai Tribes*, 219 Mont. 76, 95, 712 P.2d 754, 765-66 (1985). Montana's admission to the Union on February 22, 1889, did not affect how federally reserved water rights were established on Montana's Indian Reservations. *Winters*, 207 U.S. at 577, 28 S. Ct. at 212; *U.S. v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1939).

8. *Johnson v. M'Intosh*, 21 U.S. 543, 587-589, 591-592, 604 (1823), held that Indian tribes hold title to their lands by Indian title and tribes have the right to possess and occupy land; by right of discovery, European governments obtained ultimate dominion subject to Indian title; and Indian title is good against all but the sovereign and can only be terminated by the sovereign. 25 U.S.C. § 177 (2024); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68, 670, 94 S. Ct. 772, 777-78 (1974). Only the United States can terminate Indian title. *See generally Mont. v. Blackfeet Tribe*, 471 U.S. 759, 766-68; 105 S. Ct. 2399, 2403-04 (1985); *Swinomish Indian Tribal Community v. BNSF Ry. Co.*, 951 F.3d 1142, 1153-54 (9th Cir. 2020); *U.S. v. Morrison*, 203 F. 364 (Colo. 1901).

9. When land is held by the United States as trustee for an Indian tribe, there is no ability to acquire title to the water rights reserved for the purposes of the reservation unless Congress so specifies. 25 U.S.C. § 1322(b) (2024); 28 U.S.C.S. § 1360(b) (LexisNexis, Lexis Advance through Pub. L. No. 119-20, approved Jun. 20, 2025); *McIntire*, 101 F. 2d at 653-654; *Connolly v. Blackfeet Tribe*, 2019 Mont. Water LEXIS 133 at **6-7 (Nov. 27, 2019).

10. The Blackfeet Compact defines a water right "Recognized Under State Law" as "a water right arising under Montana law and does not include water rights arising under federal law." Section 85-20-1501, MCA, Art. II.41 (emphasis added).

11. The Blackfeet Compact defines "Water Rights Arising Under State Law" as "those valid water rights Recognized Under State Law existing as of the date the

ratification of the Compact by the Montana legislature becomes effective, and not subsequently relinquished or abandoned, as: decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permitted by DNRC; issued, as State water reservations, by the Montana Board of Natural Resources and Conservation or DNRC; exempted from filing in the State adjudication pursuant to 85-2-222, MCA; excepted from the permitting process pursuant to 85-2-306, MCA.” Section 85-20-1501, MCA, Art. II.52.

12. 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.

13. 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.

Analysis

The Blackfeet Tribe and the BIA contend Montana state water law does not apply to lands held in trust by the BIA for the benefit of the Blackfeet Tribe and the Donna Caruso-Hirst Revocable Trust (“Trust”) could not establish existing state-based water rights pursuant to Montana state water law on land, that before July 1, 1973, was continuously held in trust by the BIA for the benefit of the Blackfeet Tribe.

The Trust and Ms. Caruso-Hirst failed to provide any relevant legal argument rebutting the assertion that a state-based water right claim cannot be appropriated pursuant to Montana state water law on land held in trust by the BIA for the benefit of the Blackfeet Tribe unless Congress states otherwise. The Trust and Ms. Caruso-Hirst failed to provide any evidence that Congress specified claimant could appropriate water on land held in trust by the BIA for the benefit of the Blackfeet Tribe. By the Trust’s and Ms. Caruso-Hirst’s own admission the places of use and points of diversion for domestic claims 41M 30120776, 41M 30120777, 41M 30120778, and 41M 30120779 and stock claims 41M 30120781 and 41M 30120782 are located on land, that before July 1, 1973,

was continuously held in trust by the BIA for the benefit of the Blackfeet Tribe. While the claims meet the definition of an exempt claim pursuant to Section 85-2-222, MCA, the claims are not existing exempt claims because Montana state water law did not apply to these claims until the land underlying the claims left trust status in 2004. (See Ex. B, Claimant’s Brief in Support of Jurisdiction, filed Dec. 17, 2024.) Stated differently, to be existing exempt claims, these claims would need to be filed on pursuant to the law in place for such claims before July 1, 1973. Since the claims were held in trust by the BIA for the benefit of the Blackfeet Tribe before July 1, 1973, Montana state water law could not and did not apply to these claims until they left trust status in 2004. The claims are not existing exempt claims as defined by § 85-2-102(13), MCA. Because the claims are not existing exempt claims pursuant to § 85-2-102(13), MCA, the Montana Water Court does not have jurisdiction over these claims, and the claims should be dismissed from the adjudication.

In the alternative, the Trust and Ms. Caruso-Hirst assert the claims are *Walton* rights. This assertion does not alter the outcome concerning the claims. As noted by the Blackfeet Tribe and the BIA, the Trust’s and Ms. Caruso-Hirst’s reliance on the line of cases discussing *Walton* rights pursuant to the Crow Tribe-Montana Compact (“Crow Compact”) and reliance on the Crow Compact itself is misplaced. That line of cases does not apply to *Walton* rights and the Blackfeet Compact.

Montana Water Court decrees include those claims administered by the State of Montana. The definitions of claims “Recognized Under State Law” in the Blackfeet Compact and the Crow Compact do not determine the applicable law (state or federal) establishing the claims themselves. The definitions and terms of each compact do effect who administers which water rights – the compacting Tribe or the State of Montana – and accordingly which water rights are included in Montana Water Court decrees. While Montana Water Court decrees include *Walton* rights within the Crow Reservation boundaries (See Section 85-20-901, MCA, Art. IV.A.3), Montana Water Court decrees do not include *Walton* rights within the Blackfeet Reservation boundaries (See Section 85-20-1501, MCA, Art. IV.F.1).

Pursuant to the Blackfeet Compact, the water rights included in Montana Water Court decrees and enforced by the state of Montana are “Water Rights Arising Under State Law” which includes water rights “Recognized Under State Law.” Section 85-20-1501, MCA, Art. II.52. The Blackfeet Compact defines a water right “Recognized Under State Law” as “a water right arising under Montana law and does not include water rights arising under federal law.” Section 85-20-1501, MCA, Art. II.41 (emphasis added).

Walton rights are a product of federal law, not Montana state water law. *See Colville*, 647 F.2d at 53; *Connolly*, 2019 Mont Water LEXIS 133, * 7-8. *Walton* rights within the boundaries of the Blackfeet Reservation, by definition, are not water rights “Recognized Under State Law” and are not included in Montana Water Court decrees for the basins where the Blackfeet Reservation is located.

Comparatively, the Crow Compact’s definition of water rights “Recognized Under State Law” includes *Walton* rights,¹ and therefore, *Walton* rights within the boundaries of the Crow Reservation are included in Montana Water Court decrees for the basins where the Crow Reservation is located.²

The conclusion remains that domestic claims 41M 30120776, 41M 30120777, 41M 30120778, and 41M 30120779 and stock claims 41M 30120781 and 41M 30120782 should be dismissed from the adjudication.

Conclusions of law

Based upon claimant’s statement attached to each statement of claim, the claimed points of diversion and places of use for claims 41M 30120776, 41M 30120777, 41M 30120778, and 41M 30120779 and stock claims 41M 30120781 and 41M 30120782 were on Indian lands - lands subject to the trust relationship between the BIA and the Blackfeet

¹ The Crow Compact defines a water right “Recognized Under State Law” as “a water right arising under Montana law or a water right held by a nonmember of the Tribe on land not held in trust by the United States for the Tribe or a Tribal member.” Section 85-20-901, MCA, Art. II.19 (emphasis added). The underlined portion of the Crow Compact definition defines a *Walton* right. *See Scott Ranch, LLC* 2017 MT 230, 388 Mont. 509, 402 P.3d 1207.

² Hence, a Water Court claim abstract for a *Walton* right within the boundaries of the Crow Reservation identifies the claim as a Reserved Claim with information remarks identifying the claim as a *Walton* right and stating the claim is not part of the Tribal Water Right defined by the Crow Compact. *See Scott Ranch, LLC v. United States*, 2025 Mont. Water LEXIS 256 (May 13, 2025).

Tribe until 2004 – and there was no ability to acquire title to the water rights reserved for the purposes of an Indian reservation unless Congress so specified. Upon the date, or after the date, a fee patent was issued by the United States, such lands become subject to the laws of the United States and Montana state water law. For the captioned claims, upon or after the fee patent issuance date in 2004, Montana state water law applied to the appropriation of water on these lands and a private appropriator could establish a beneficial use of water pursuant to state law.

The jurisdiction of the Montana Water Court is to determine existing water rights. The location of the points of diversion and places of use for the captioned claims on land, that before July 1, 1973, was continuously held in trust by the BIA for the benefit of the Blackfeet Tribe foreclosed the appropriation of water pursuant to Montana state water law. The water rights identified by domestic claims 41M 30120776, 41M 30120777, 41M 30120778, and 41M 30120779 and stock claims 41M 30120781 and 41M 30120782 could not be appropriated pursuant to Montana state water law as the law existed before July 1, 1973. The claims are not existing water rights within the jurisdiction of the Montana Water Court.

Walton rights within the Blackfeet Reservation are not included in Montana Water Court decrees pursuant to the Blackfeet Compact's terms and the Blackfeet Compact's definitions of "Recognized Under State Law" and "Water Rights Arising Under State Law" because *Walton* rights are not water rights "Recognized Under State Law" and therefore are not "Water Rights Arising Under State Law" administered by the State of Montana. Therefore, even if domestic claims 41M 30120776, 41M 30120777, 41M 30120778, and 41M 30120779 and stock claims 41M 30120781 and 41M 30120782 were proven *Walton* rights, they would not be included in Montana Water Court decrees.

Domestic claims 41M 30120776, 41M 30120777, 41M 30120778, and 41M 30120779 and stock claims 41M 30120781 and 41M 30120782 should be dismissed

The dismissal of the claims moots the notice issue remark appearing on each claim, and resolves the court's on motion concern for domestic claims 41M 30120776 and 41M 30120778.

Recommendations

Domestic claims 41M 30120776, 41M 30120777, 41M 30120778, and 41M 30120779 and stock claims 41M 30120781 and 41M 30120782 should be **DISMISSED**.

Post Decree Abstracts of Water Right Claim are served with this Report to confirm the dismissal of the claims in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via Electronic Mail

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TWO MEDICINE RIVER
BASIN 41M**

Water Right Number: 41M 30120776 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: DISMISSED

Owners: CARUSO-HIRST, DONNA REVOCABLE TRUST
CARUSO-HIRST, DONNA TRUSTEE
518 BADGER CREEK
VALIER, MT 59486-5820

***Priority Date:**

Type of Historical Right:

Purpose (Use): DOMESTIC

Flow Rate:

Volume:

Source Name: GROUNDWATER

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TWO MEDICINE RIVER
BASIN 41M**

Water Right Number: **41M 30120777** STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: **DISMISSED**

Owners: CARUSO-HIRST, DONNA REVOCABLE TRUST
CARUSO-HIRST, DONNA TRUSTEE
518 BADGER CREEK
VALIER, MT 59486-5820

Priority Date:

Type of Historical Right:

Purpose (Use): DOMESTIC

Flow Rate:

Volume:

Source Name: GROUNDWATER

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TWO MEDICINE RIVER
BASIN 41M**

Water Right Number: **41M 30120778** STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: **DISMISSED**

Owners: CARUSO-HIRST, DONNA REVOCABLE TRUST
 CARUSO-HIRST, DONNA TRUSTEE
 518 BADGER CREEK
 VALIER, MT 59486-5820

***Priority Date:**

Type of Historical Right:

Purpose (Use): DOMESTIC

Flow Rate:

Volume:

Source Name: GROUNDWATER

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TWO MEDICINE RIVER
BASIN 41M**

Water Right Number: **41M 30120779** STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: **DISMISSED**

Owners: CARUSO-HIRST, DONNA REVOCABLE TRUST
CARUSO-HIRST, DONNA TRUSTEE
518 BADGER CREEK
VALIER, MT 59486-5820

Priority Date:

Type of Historical Right:

Purpose (Use): DOMESTIC

Flow Rate:

Volume:

Source Name: GROUNDWATER

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TWO MEDICINE RIVER
BASIN 41M**

Water Right Number: 41M 30120781 STATEMENT OF CLAIM
Version: 2 -- POST DECREE
Status: **DISMISSED**

Owners: CARUSO-HIRST, DONNA REVOCABLE TRUST
CARUSO-HIRST, DONNA TRUSTEE
518 BADGER CREEK
VALIER, MT 59486-5820

Priority Date:

Type of Historical Right:

Purpose (Use): STOCK

Flow Rate:

Volume:

Source Name: BADGER CREEK
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TWO MEDICINE RIVER
BASIN 41M**

Water Right Number: **41M 30120782** STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: **DISMISSED**

Owners: CARUSO-HIRST, DONNA REVOCABLE TRUST
CARUSO-HIRST, DONNA TRUSTEE
518 BADGER CREEK
VALIER, MT 59486-5820

Priority Date:

Type of Historical Right:

Purpose (Use): STOCK

Flow Rate:

Volume:

Source Name: GROUNDWATER

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.