

Montana Water Court  
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IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
KOOTENAI RIVER BASIN (76D)  
PRELIMINARY DECREE

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CLAIMANTS: Janet K. Severy; Niles I. Severy

OBJECTOR: United States of America (USDA Forest Service)

**CASE 76D-0225-R-2022**

76D 140777-00

76D 140779-00

**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

### Statement of the case

The United States of America (USDA Forest Service) (“Forest Service”) filed the same objection to the maximum acres irrigated, place of use, point of diversion, and means of diversion for irrigation claim 76D 140777-00 and fish and wildlife claim 76D 140779-00.

Fish and wildlife claim 76D 140779-00 appeared in the Preliminary Decree with issue remarks concerning flow rate, volume, and period of diversion. Issue remarks most often 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. Issue remarks may also provide notice to water users concerning a claim.

Montana law requires the Water Court to resolve objections and issue remarks. On January 16, 2025, the parties<sup>1</sup> filed a Stipulation to Resolve Objections.

### Issues

1. Should the court accept the stipulated terms?
2. Are the flow rate, volume, and period of diversion issue remarks on claim 76D 140779-00 resolved?

### Findings of Fact

1. The historical point of diversion and place of use identified by claims 76D 140777-00 and 76D 140779-00 do not include Forest Service owned land within their legal land descriptions.

2. The historical point of diversion for both claims is the NENW of Section 8, Township 32 North, Range 33 West, Lincoln County.

3. An information remark limiting the historical point of diversion and place of

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<sup>1</sup> Janet K. Severy is deceased. Signatory Rhonda O’Neill has Power of Attorney for her brother, Niles I. Severy.

use to private land should be added to both claims.

4. The Preliminary Decree abstract for fish and wildlife claim 76D 140779-00 identifies the historically accurate flow rate, volume, and period of diversion.

### **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. If the settlement agreement expands or enlarges an element of a claim, evidence meeting the burden of proof must be provided. If the evidence does not meet the burden of proof, the element shall not be expanded or enlarged. Rule 17(b), 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. 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.

7. The Water Court may add clear and unambiguous information remarks to a claim abstract that describe historical use and reduce the possibility of future conflict. *See Clark Fork Coalition v. Hirsch*, 2014 Mont. Water LEXIS 15 at \*\*10-14 (Oct. 29, 2014).

## **Analysis**

### **Issue 1 – acceptance of stipulated terms**

The Forest Service’s objection stated, “Statement of Claim map shows points of diversion and places of use occur on private lands. Additionally, a remark indicating that points of diversion and places of use only within HES 1241 and 738 should be added.”

Prima facie statements of claim 76D 140777-00 and 76D 140779-00 identify the source as Noseeum Creek. The point of diversion identified by prima facie statements of claim 76D 140777-00 and 76D 140779-00 is the SWNENW of Section 8, Township 32 North, Range 33 West, Lincoln County.

The Forest Service explained and provided evidence that claimants own HES 1241 in the NENW of Section 8, Township 32 North, Range 33 West, Lincoln County and adjacent Tracts A, B, and C of HES 738, in Sections 5 and 8, Township 32 North, Range 33 West, Lincoln County. The Forest Service explained that Noseeum Creek does not flow through the SWNENW of Section 8, Township 32 North, Range 33 West, Lincoln County (identified as Forest Service land) but it does flow through HES 1241 in the NENW of Section 8, Township 32 North, Range 33 West, Lincoln County. The Forest Service provided an aerial photo modified to demonstrate where Noseeum Creek flows on claimants’ property. (For the Forest Service explanation and evidence, please see the court’s case management system, FullCourt Enterprise, at document sequence 6.00.) The foregoing supports the parties’ stipulated less specific legal land description for the point of diversion for each claim.

The place of use legal land description for each claim includes Forest Service land. There is no stipulated modification to the place of use legal land descriptions. However, the parties stipulated that land owned by the Forest Service is not included in the place of

use description for each claim and that an information remark should be added to each claim noting such. The stipulated information remark ensures that no Forest Service land is included within either the point of diversion or place of use legal land descriptions.

### **Conclusions of law**

The stipulated information remark concerning point of diversion and place of use describes historical use and reduces the possibility of future conflict. The information remark should be added to the claim abstracts.

The parties provided a preponderance of evidence supporting the less specific point of diversion legal land description thereby overcoming the prima facie statements of claim and justifying the point of diversion modification to the claims.

The Stipulation should be accepted by the court thereby resolving the Forest Service objections.

### **Issue 2 – issue remark resolution, claim 76D 140779-00**

Claim 76D 140779-00 appeared in the Preliminary Decree 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.

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 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.

Water users were given the opportunity to review the claim and file an objection. The deadline to file objections has expired. Claim 76D 140779-00 received no objections to its flow rate, volume, or period of diversion.

### **Conclusions of law**

The Preliminary Decree abstract for claim 76D 140779-00 identifies the historically accurate flow rate, volume, and period of diversion. The referenced flow rate, volume, and period of diversion issue remarks served their notice purpose.

**Recommendations**

Irrigation claim 76D 140777-00 and fish and wildlife claim 76D 140779-00 should be modified as follows to accurately reflect historical use.

**POINT OF DIVERSION:**

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
	SWNENW	8	32N	33W	LINCOLN

**ADD INFORMATION REMARK:**

**THE POINT OF DIVERSION AND PLACE OF USE ARE LOCATED WITHIN HES 1241 AND 738.**

The flow rate, volume, and period of diversion issue remarks should be removed from the abstract of claim 76D 140779-00.

Post Decree Abstracts of Water Right Claim accompany this report to confirm the recommendations have been implemented in the state’s centralized water right record system.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

**Service via USPS Mail**

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

**Water Right Number:** 76D 140777-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**Owners:** NILES I SEVERY  
PO BOX 1349  
CASTLE ROCK, WA 98611-1349

**Priority Date:** SEPTEMBER 28, 1922

**Type of Historical Right:** FILED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 287.23 GPM

**Volume:** 78.20 AC-FT

**Climatic Area:** 4 - MODERATELY LOW

**Maximum Acres:** 17.00

**Source Name:** NOSEEUM 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		NENW	8	32N	33W	LINCOLN

**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	6.00		SWSWSE	5	32N	33W	LINCOLN
2	5.00		E2SESW	5	32N	33W	LINCOLN
3	5.00		NWNWNE	8	32N	33W	LINCOLN
4	1.00		NENENW	8	32N	33W	LINCOLN

**Total:** 17.00

**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.

140776-00                      140777-00

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.

140777-00            140779-00

THE POINT OF DIVERSION AND PLACE OF USE ARE LOCATED WITHIN HES 1241 AND 738.



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

**Water Right Number:** 76D 140779-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** NILES I SEVERY  
PO BOX 1349  
CASTLE ROCK, WA 98611-1349

**Priority Date:** SEPTEMBER 28, 1922

**Type of Historical Right:** FILED

**Purpose (Use):** FISH AND WILDLIFE

**Flow Rate:** 1.00 CFS

**Volume:** 724.00 AC-FT

**Source Name:** NOSEEUM 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		NENW	8	32N	33W	LINCOLN

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

**Diversion Means:** HEADGATE  
SECTION 8 IS A PROTRACTION BLOCK: PB41.

**Reservoir:** OFFSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NENENW	8	32N	33W	LINCOLN

**Diversion to Reservoir:** DIVERSION # 1

**Depth:** 5.00 FEET

**Surface Area:** 0.25 ACRES

**Capacity:** 0.50 ACRE-FEET

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

**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			NENENW	8	32N	33W	LINCOLN
2			NENWNE	8	32N	33W	LINCOLN

**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.

140777-00      140779-00

THE POINT OF DIVERSION AND PLACE OF USE ARE LOCATED WITHIN HES 1241 AND 738.

