

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
(406) 586-4364
1-800-624-3270
watercourt@mt.gov

FILED
01/08/2025
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
41E-0181-R-2024
Lambert, Kathryn
12.00

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
BOULDER RIVER—TRIBUTARY OF THE JEFFERSON RIVER (BASIN 41E)
PRELIMINARY DECREE

CLAIMANT: Donna J. Gilmer

OBJECTOR: Edward K. McCauley

CASE 41E-0181-R-2024

41E 143101-00

41E 143102-00

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, conclusion 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 mail 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

Edward K. McCauley objected to each of these claims. On February 26, 2024 the parties filed a joint Response which includes a request to change the ditch name on 41E 143101-00. The June 20, 2024 Order Setting Filing Deadline raised various concerns and identified needed additional supporting evidence and explanation. On November 26, 2024 the parties filed a second Response providing additional explanations and evidence to support their requested

changes to claim 143101-00, but insufficient evidence to support one of the requested changes to claim 41E 143102-00. This settlement documentation is viewable in the Court's FullCourt Enterprise case management system.

APPLICABLE LAW

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to 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 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 including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. For claim 41E 143101-00, the Preliminary Decree states that the priority date is JULY 20, 1894. There are three different notices of appropriation attached to the Statement of Claim. The parties' second Response confirms that this Little Boulder River appropriation is based on the William L. Sweet notice which states the water right was appropriated on July 20, 1874. The notice was recorded on July 22, 1874. The Statement of Claim used the recording date, July 22, 1874, rather than the actual appropriation date, July 20, 1874. The 1984 DNRC Verification worksheet shows that the reviewer noted the priority date should be changed from July 22, 1874 to July 20, 1874. For some unknown reason, the priority date appearing in the 1985 Temporary Preliminary Decree is July 20, 1894. It appears this is a keypunch error made when the reviewer corrected 22 to 20. As noted by the reviewer in 1984 and as requested by the parties now, the priority date should be JULY 20, 1874.

2. For claim 41E 143101-00, the Statement of Claim states the flow rate is 35.00 miner's inches to irrigate 35.00 acres. This flow rate is not the implementation of a standard as described in the second Response. This is the flow rate specified by Milton O. Gilman on the Statement of Claim.

The William L. Sweet notice does not include a numerical quantification. It states that, at location where the notice is posted, "he claims said waters for mining, agricultural, and mechanical purposes". At the time this claim was verified in in 1984, the 35.00 miner's inch

flow rate was converted to 0.88 CFS. The Temporary Preliminary Decree states the flow rate is 0.88 CFS which is equivalent to 35.00 miner's inches and equivalent to 394.90 GPM. The 394.90 GPM flow rate appears on the abstract in the Preliminary Decree.

The second Response filed by the parties requests the flow rate be increased to 100 miner's inches, the equivalent of 2.50 CFS. The second response includes the following:

My personal experience with this place of use and the point of diversion and ditch were a flow of 100 Miners Inches. When we took over the ranching operation for this place of use in April of 1972, my father, Emmett McCauley and I were shown this diversion from the Little Boulder River and place of use along the South side of the stream in the N1/2NE of Section 9 owned by Diamond S Ranch Hotels by Mr. Donald Larson. He was the successor to Mr. Smith along with his partner James Sandall and Ryan Mack. He operated the ranching endeavor and was dissolving his interest to pursue his family's ranch. He explained that the ranch was entitled to 100 Miners Inches at this ditch. That is the flow we used during our tenure until the end of 1975 when the owners decide to split up the property and sell the parcels. The meadow is rough and it is common practice to use high flows for short periods of time to effectively irrigate fields next to streams or sources that are at risk of flooding at certain times to protect the field from damage. The carry water not used by the field readily returns to the source before another diversion from this source.

The flow rate should be 2.50 CFS.

3. For claim 41E 143101-00, the Preliminary Decrees states the ditch name is SMITH FLOOD DITCH. The ditch name should be DOUGLAS-SMITH FLOOD DITCH.

4. For claim 41E 143101-00, the Preliminary Decree includes the following notice remark:

DITCH NAME 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.

The remark does not raise an unresolved issue which needs to be addressed. There are no proceedings required for the remark. The remark should be removed as having served its notice purpose.

5. For claim 41E 143102-00, the Preliminary Decree states that the priority date is December 31, 1938. The second Response confirms that the ditch was in place in 1938, then states the following:

While we have found some evidence of water use prior to this date, January 1, 1895 (Ex 6) it is up to the Water Court to determine whether that evidence is sufficient to change the Priority Date. If it does not then the objection to Priority Date will be withdrawn.

Exhibit 6 is a copy of a placer mining location filing by R. M. Cralle which states the location was posted on January 1, 1895. This was filed with the Jefferson County Recorder on January 15, 1895. Most of the filing is form text with blanks to be filled in. "Water" is included in the form text, and within that same text, limited to working the placer mining claim. As anticipated in the second Response, this is not sufficient evidence that the water was diverted and used for irrigation in 1895. The priority date should remain as claimed, December 31, 1938.

6. For claim 41E 143102-00, the Preliminary Decree includes the following notice remark:

POINT 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.

The remark does not raise an unresolved issue which needs to be addressed. There are no proceedings required for the remark. The remark should be removed as having served its notice purpose.

CONCLUSION OF LAW

The settlement filed by the parties is sufficient to contradict and overcome prima facie claim 41E 143101-00 but not sufficient to contradict and overcome prima facie claim 41E 143102-00.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim for each claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service via USPS Mail:

Donna J. Gilmer
PO Box 6
Boulder, MT 59632

Edward K. McCauley
PO Box 393
Boulder, MT 59632

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BOULDER RIVER, TRIBUTARY TO JEFFERSON RIVER
BASIN 41E**

Water Right Number: 41E 143101-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: DONNA J GILMER
PO BOX 6
BOULDER, MT 59632-0006

Priority Date: JULY 20, 1874

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 2.50 CFS

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 35.00

Source Name: LITTLE BOULDER RIVER

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		SWNWNE	9	5N	4W	JEFFERSON

Period of Diversion: MAY 1 TO SEPTEMBER 15

Diversion Means: HEADGATE

Ditch Name: DOUGLAS-SMITH FLOOD DITCH

Period of Use: MAY 1 TO SEPTEMBER 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	35.00		N2NE	9	5N	4W	JEFFERSON

Total: 35.00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BOULDER RIVER, TRIBUTARY TO JEFFERSON RIVER
BASIN 41E**

Water Right Number: 41E 143102-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: DONNA J GILMER
PO BOX 6
BOULDER, MT 59632-0006

Priority Date: DECEMBER 31, 1938

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 134.64 GPM

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 13.00

Source Name: LITTLE BOULDER RIVER

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		NESESWNW	9	5N	4W	JEFFERSON

Period of Diversion: JUNE 1 TO SEPTEMBER 1

Diversion Means: HEADGATE

Period of Use: JUNE 1 TO SEPTEMBER 1

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		E2NW	9	5N	4W	JEFFERSON
Total:	13.00						