

Montana Water Court
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FILED
07/24/2025
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
76N-0050-R-2024
Weisz, Madeleine
5.00

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
CLARK FORK RIVER BELOW THE FLATHEAD RIVER BASIN (76N)
PRELIMINARY DECREE

* * * * *

CLAIMANT: United States of America (Department of
Agriculture & Forest Service)

CASE 76N-0050-R-2024
76N 52595-00
76N 52599-00

OBJECTOR: United States of America (Department of
Agriculture & Forest Service)

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

Claims 76N 52595-00 and 76N 52599-00 appeared in the Preliminary Decree for the Clark Fork River Below the Flathead River Basin (Basin 76N) issued September 21, 2023. The claims received objections from Claimant, United States, DOA Forest Service (United States). The claims also received issue remarks. Issue remarks are notations identifying potential legal or factual issues with water rights and the Water Court is required to resolve these potential issues.

FINDINGS OF FACT

1. Claim 76N 52595-00 was decreed as a claim for livestock drinking directly from McGinnis Creek as follows:

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		SWNWSE	8	22N	25W	SANDERS

Period of Diversion: JUNE 1 TO OCTOBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: JUNE 1 TO OCTOBER 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			NENESW	2	21N	25W	SANDERS

2. The United States objected to the point of diversion and place of use of claim 76N 52595-00, stating:

The legal land description for the points of diversion and place of use should be modified to include McGinnis Creek within the Range Management Unit, which more accurately reflects historical and actual use. The following modifications are necessary to resolve the Forest Service's objection:

Point of Diversion Id. No. 1 should be corrected to SE Section 8, Township 22N, Range 25W, Sanders County.

Point of Diversion Id. No. 2 should be added as Section 16, Township 22N, Range 25W, Sanders County.

Point of Diversion Id. No. 3 should be added as NENENE Section 17, Township 22N, Range 25W, Sanders County.

Point of Diversion Id. No. 4 should be added as NENE Section 21, Township 22N, Range 25W, Sanders County.

Point of Diversion Id. No. 5 should be added as W2 Section 22, Township 22N, Range 25W, Sanders County.

Point of Diversion Id. No. 6 should be added as SE Section 22, Township 22N, Range 25W, Sanders County.

Point of Diversion Id. No. 7 should be added as W2 Section 26, Township 22N, Range 25W, Sanders County.

Point of Diversion Id. No. 8 should be added as E2NW Section 27, Township 22N, Range 25W, Sanders County.

Point of Diversion Id. No. 9 should be added as NWNWNE Section 35, Township 22N, Range 25W, Sanders County.

Place of Use Id. No. 1 should be corrected to SE Section 8, Township 22N, Range 25W, Sanders County.

Place of Use Id. No. 2 should be added as Section 16, Township 22N, Range 25W, Sanders County.

Place of Use Id. No. 3 should be added as NENENE Section 17, Township 22N, Range 25W, Sanders County.

Place of Use No. 4 should be added as NENE Section 21, Township 22N, Range 25W, Sanders County.

Place of use No. 5 should be added as W2 Section 22, Township 22N, Range 25W, Sanders County.

Place of use No. 6 should be added as SE Section 22, Township 22N, Range 25W, Sanders County.

Place of use No. 7 should be added as W2 Section 26, Township 22N, Range 25W, Sanders County.

Place of use No. 8 should be added as E2NW Section 27, Township 22N, Range 25W, Sanders County.

Place of use No. 9 should be added as NWNWNE Section 35, Township 22N, Range 25W, Sanders County.

Therefore, this objection will be resolved if the above modifications to the points of diversion and place of use are made.

3. The claim also received the following point of diversion and place of use issue remark:

PLACE OF USE APPEARS TO BE INCORRECT. THE PLACE OF USE APPEARS TO BE SWNWSE 8 TWP 22N RGE 25W SANDERS MT.

4. Claim 76N 52599-00 was decreed as a direct from source livestock claim from the Thompson River with the following point of diversion and place of use legal land description:

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		SESWNE	26	25N	27W	SANDERS

Period of Diversion: JUNE 1 TO OCTOBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: JUNE 1 TO OCTOBER 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			NWNENW	26	25N	27W	SANDERS

5. The United States objection to the point of diversion and place of use for claim 76N 52599-00, stating:

Point of Diversion No. 1 should be corrected to SWNE Section 26, Township 25N, Range 27W, Sanders County.

Point of Diversion No. 2 should be included as N2NW Section 26, Township 25N, Range 27W, Sanders County.

Place of Use No. 1 should be corrected to N2NW Section 26, Township 26N, Range 27W, Sanders County.

Place of Use No. 2 should be included as SWNE Section 26, Township 25N, Range 27W, Sanders County.

Therefore, this objection will be resolved if the above modifications to the points of diversion and place of use are made.

6. On January 29, 2025, the United States filed evidence supporting their objections. (Doc.¹ 2.00).

7. On March 28, 2025, the United States filed a Declaration from Forest Service's Region I Water Rights and Uses Program Manager Thor Burbach. (Doc. 4.00).

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

8. In his Declaration, Burbach provides evidence that historically it was common practice for “direct from source claims ... to identify a reach of stream of the extent of which was delineated by a single point of diversion and place of use at the upstream and downstream locations,” consistent with the original 1985 DNRC Claims Examination Manual (Claims Examination Manual) included as Attachment 1 in the Declaration. (Doc. 4.00).

9. The Claims Examination Manual provides that “[c]ertain forests defined the POD where the cattle start drinking and dined the POU where the cattle quit drinking,” which Burbach explains in his Declaration was true of both claims. (Doc. 4.00; Attachment 1).

10. The claim also received the following means of diversion issue remark:

THE CLAIMED MEANS OF DIVERSION APPEARS BE INCORRECT AND CANNOT BE CONFIRMED DUE TO LACK OF DATA.

11. When placing the issue remark, the DNRC noted:

D65: THE CLAIMED MEANS OF DIVERSION APPEARS BE INCORRECT AND CANNOT BE CONFIRMED DUE TO LACK OF DATA. This claim was originally filed as it appears here but the POD and POU are too far apart to be livestock direct from source as that requires the same location. As there is no claim map in the file, I am uncertain as to if there was a typo made on the form or the wrong MOD was used. Claimant assistance is required. 5/12/2023 emm

Rge County

PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.

2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

6. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

7. When resolving issue remarks, the 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. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

8. The party seeking to overcome the prima facie status of a Statement of Claim bears the burden of proof; this burden also applies to a claimant's objection to his own claim. *Nelson v. Brooks*, 2014 MT 120, ¶¶ 34, 37, 375 Mont. 86, 329 P.3d 558.

9. A water right cannot be enlarged beyond the original beneficial use by the original appropriator to the injury of other appropriators. *Quigley v. McIntosh*, 110 Mont. 495, 505, 103 P.2d 1067, 1072 (1940).

10. Prior to July 1, 1973 when the Montana Water Use Act became law, a water user could change the point of diversion, place of use, or even purpose of a water right by simply implementing the change. The only restriction was that the change could not cause injury to other water users. §89-803 RCM (1947) (repealed 1973). The burden was on the party claiming an injury to prove that the change to the water right at issue adversely impacted their ability to exercise their water rights. *Hansen v. Larsen*, 44 Mont. 350, 353, 120 Pd. 229, 231 (1911).

CONCLUSIONS OF LAW

1. The United States's objections overcome the prima facie status of claims 76N 52595-00 and 76N 52599-00. The evidence in the Declaration support that claims 76N 52595-00 and 76N 52599-00 historically used water from the entire stretch of the claimed source, which are described by the Stipulation's proposed corrections.

2. The Stipulation's proposed corrections resolve the place of use issue remark on claim 76N 52595-00.

3. The means of diversion issue remark does not overcome the prima facie status of claim 76N 52599-00. As supported by the Declaration and proposed modifications, claim 76N 52599-00 historically used the entire stretch of Thompson River between the originally claimed point of diversion and place of use.

RECOMMENDATIONS

1. The point of diversion and place of use for claim 76N 52595-00 should be modified as follows:

Point of Diversion Id. No. 1 should be corrected to SE Section 8, Township 22N, Range 25W, Sanders County.

Point of Diversion Id. No. 2 should be added as Section 16, Township 22N, Range 25W, Sanders County.

Point of Diversion Id. No. 3 should be added as NENENE Section 17, Township 22N, Range 25W, Sanders County.

Point of Diversion Id. No. 4 should be added as NENE Section 21, Township 22N, Range 25W, Sanders County.

Point of Diversion Id. No. 5 should be added as W2 Section 22, Township 22N, Range 25W, Sanders County.

Point of Diversion Id. No. 6 should be added as SE Section 22, Township 22N, Range 25W, Sanders County.

Point of Diversion Id. No. 7 should be added as W2 Section 26, Township 22N, Range 25W, Sanders County.

Point of Diversion Id. No. 8 should be added as E2NW Section 27, Township 22N, Range 25W, Sanders County.

Point of Diversion Id. No. 9 should be added as NWNWNE Section 35, Township 22N, Range 25W, Sanders County.

Place of Use Id. No. 1 should be corrected to SE Section 8, Township 22N, Range 25W, Sanders County.

Place of Use Id. No. 2 should be added as Section 16, Township 22N, Range 25W, Sanders County.

Place of Use Id. No. 3 should be added as NENENE Section 17, Township 22N, Range 25W, Sanders County.

Place of Use No. 4 should be added as NENE Section 21, Township 22N, Range 25W, Sanders County.

Place of use No. 5 should be added as W2 Section 22, Township 22N, Range 25W, Sanders County.

Place of use No. 6 should be added as SE Section 22, Township 22N, Range 25W, Sanders County.

Place of use No. 7 should be added as W2 Section 26, Township 22N, Range 25W, Sanders County.

Place of use No. 8 should be added as E2NW Section 27, Township 22N, Range 25W, Sanders County.

Place of use No. 9 should be added as NWNWNE Section 35, Township 22N, Range 25W, Sanders County.

2. The point of diversion and place of use for claim 76N 52599-00 should be modified as follows:

Point of Diversion No. 1 should be corrected to SWNE Section 26, Township 25N, Range 27W, Sanders County.

Point of Diversion No. 2 should be included as N2NW Section 26, Township 25N, Range 27W, Sanders County.

Place of Use No. 1 should be corrected to N2NW Section 26, Township 26N, Range 27W, Sanders County.

Place of Use No. 2 should be included as SWNE Section 26, Township 25N, Range 27W, Sanders County.

3. The issue remarks should be removed from the claim abstracts.

A post decree abstract of each water right claim reflecting these recommendations is attached to this Report.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via Electronic Mail:

Alexa Penalosa, Trial Attorney
Katharine L Laubach, Trial Attorney
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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
CLARK FORK, BELOW FLATHEAD RIVER
BASIN 76N**

Water Right Number: 76N 52595-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: USA (DEPT OF AGRICULTURE FOREST SERVICE)
WATER RIGHTS PROGRAM MANAGER, NORTHERN REGION
26 FORT MISSOULA RD
MISSOULA, MT 59804-7203

Priority Date: JUNE 1, 1915

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 STOCKWATERING 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: MCGINNIS CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SE	8	22N	25W	SANDERS
Period of Diversion:	JUNE 1 TO OCTOBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
2			16	22N	25W	SANDERS
Period of Diversion:	JUNE 1 TO OCTOBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
3		NENENE	17	22N	25W	SANDERS
Period of Diversion:	JUNE 1 TO OCTOBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
4		NENE	21	22N	25W	SANDERS
Period of Diversion:	JUNE 1 TO OCTOBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
5		W2	22	22N	25W	SANDERS
Period of Diversion:	JUNE 1 TO OCTOBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
6		SE	22	22N	25W	SANDERS
Period of Diversion:	JUNE 1 TO OCTOBER 31					

Diversion Means:	LIVESTOCK DIRECT FROM SOURCE							
7	W2	26	22N	25W	SANDERS			
Period of Diversion:	JUNE 1 TO OCTOBER 31							
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE							
8	E2NW	27	22N	25W	SANDERS			
Period of Diversion:	JUNE 1 TO OCTOBER 31							
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE							
9	NWNWNE	35	22N	25W	SANDERS			
Period of Diversion:	JUNE 1 TO OCTOBER 31							
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE							
Period of Use:	JUNE 1 TO OCTOBER 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			SE	8	22N	25W	SANDERS
2				16	22N	25W	SANDERS
3			NENENE	17	22N	25W	SANDERS
4			NENE	21	22N	25W	SANDERS
5			W2	22	22N	25W	SANDERS
6			SE	22	22N	25W	SANDERS
7			W2	26	22N	25W	SANDERS
8			E2NW	27	22N	25W	SANDERS
9			NWNWNE	35	22N	25W	SANDERS

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
CLARK FORK, BELOW FLATHEAD RIVER
BASIN 76N

Water Right Number: 76N 52599-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: USA (DEPT OF AGRICULTURE FOREST SERVICE)
WATER RIGHTS PROGRAM MANAGER, NORTHERN REGION
26 FORT MISSOULA RD
MISSOULA, MT 59804-7203

Priority Date: JUNE 1, 1915

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 STOCKWATERING 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: THOMPSON 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		SWNE	26	25N	27W	SANDERS

Period of Diversion: JUNE 1 TO OCTOBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

2		N2NW	26	25N	27W	SANDERS
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Period of Diversion: JUNE 1 TO OCTOBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: JUNE 1 TO OCTOBER 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			SWNE	26	25N	27W	SANDERS
2			N2NW	26	25N	27W	SANDERS