

**IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MISSOURI RIVER ABOVE HOLTER DAM BASIN (41I)
PRELIMINARY DECREE**

* * * * *

CLAIMANTS: Dooley Land & Livestock LLC; Connie Shindoll;
Albert N. Shindoll Trust

OBJECTORS: Dooley Land & Livestock LLC; Connie Shindoll;
Albert N. Shindoll Trust

NOTICE OF INTENT TO APPEAR: Dooley Land & Livestock
LLC; Jeffrey C. Marks

CASE 41I-0050-R-2023

41I 27402-00

41I 132426-00

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

The above-captioned claims appeared in the Preliminary Decree for the Missouri River above Holter Dam (Basin 41I) issued on June 24, 2022. Claim 41I 27402-00 is owned by Connie Shindoll and the Albert N. Shindoll Trust (collectively, "Shindoll"). Claim 41I 132426-00 is owned by Dooley Land & Livestock LLC ("Dooley"). Both claims received self-objections from their respective owners. Shindoll objected to claim 41I 132426-00. Dooley filed a notice of intent to appear on claim 41I 27402-00. Jeffrey C. Marks filed a notice of intent to appear on claim 41I 132426-00. Mr. Marks withdrew his notice. (Doc.¹ 25.00). Claim 41I 132426-00 also received issue remarks.

FINDINGS OF FACT

1. After an initial settlement period, the Court placed this matter on a hearing track. (Doc. 6.00). The deadline to file pre-trial motions was October 18, 2024.

2. Both parties filed pre-trial motions. Dooley filed their *Motion to Amend to Resolve Issue Remarks on Claim 41I 132426-00 and Brief in Support*. (Doc. 11.00). Shindoll filed the following motions:

- *Motion for Summary Judgment Concerning the Point of Diversion and Place of Use for Water Right 41I 27402 and Brief in Support* (Doc. 12.00);
- *Motion for Site Visit and Brief in Support* (Doc. 13.00);
- *Motion for Summary Judgment to Establish that Water Right 41I 132426 has been Abandoned and Brief in Support* (Doc. 14.00).

3. Dooley filed responses to each of Shindoll's motions. (Docs. 15.00-19.00).

4. On November 14, 2024, Dooley filed an unopposed motion to appoint a mediator. (Doc. 20.00). Dooley's motion was granted, and the parties attended mediation.

5. The parties reached an agreement at mediation and filed a *Stipulation and Settlement Agreement*. (Doc. 28.00).

6. The *Agreement*, if accepted by the Court, resolves Dooley's notice of intent to appear ("NOIA") on claim 41I 27402-00 and Shindoll's objection to claim 41I 132426-00. The *Agreement* also addresses the issue remarks on claim 41I 132426-00.

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

7. The *Agreement* incorporates the modifications proposed in Dooley's *Motion to Amend* and Shindoll's *Motion for Summary Judgment Concerning the Point of Diversion and Place of Use for Water Right 41I 27402-00*. Both motions are deemed well taken by the opposing party.

8. As part of the *Agreement*, Shindoll agreed to withdraw its *Motion for Summary Judgment to Establish Water Right 41I 132426-00 has been Abandoned* and its associated briefing (Docs. 14.00, 24.00) and its *Response Brief in Opposition to Dooley's Motion to Amend* (Doc. 16.00).

41I 132426-00

9. Claim 41I 132426-00 was decreed as a 170.00-gallon per minute (GPM) flood irrigation claim from Gaunt Spring. The point of diversion and place of use were decreed as:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>	
1		SENWNW	35	8N	3E	BROADWATER	
Period of Diversion: APRIL 15 TO OCTOBER 31							
Diversion Means: HEADGATE							
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	10.00		NWSE	34	8N	3E	BROADWATER
Total:	10.00						

10. The claim received the following issue remarks:

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.
 THE BROADWATER COUNTY WATER RESOURCES SURVEY (1956) APPEARS TO INDICATE 0.00 ACRES IRRIGATED.
 USDA AERIAL PHOTOGRAPH NO(S). 479-22 , DATED 08/29/1979 , APPEARS TO INDICATE 5.0 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

11. The *Agreement* and *Motion to Amend* request the following modifications to claim 41I 132426-00:

Flow Rate: ~~170.00 GPM~~ 120.00 GPM
 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: ~~10.00~~ 5.00
 Source Name: SPRING, UNNAMED TRIBUTARY OF UNNAMED TRIBUTARY OF NORTH FORK RAY CREEK
 Source Type: ~~SURFACE WATER~~ GROUNDWATER
 ALSO KNOWN AS GAUNT SPRING
 THE WATER FROM THIS SPRING IN THE RAY CREEK DRAINAGE IS INSUFFICIENT TO CONTRIBUTE WATER TO RAY CREEK AND THIS SPRING PROVIDES WATER EVEN THOUGH RAY CREEK MAY NOT BE RUNNING.
 Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	SENENW	SENWNW	35	8N	3E	BROADWATER

 Period of Diversion: APRIL 15 TO OCTOBER 31
 Diversion Means: ~~HEADGATE~~ DEVELOPED SPRING

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>
1	10.00 5.00		NWSE	34	8N	3E
Total:	10.00 5.00					BROADWATER

12. The *Agreement* also proposes the following information remarks be added to the claim abstract:

THE INCIDENTAL USE OF THIS RIGHT FOR STOCK IS LIMITED TO TIMES WHEN WATER IS DIVERTED FOR IRRIGATION AND DOES NOT PROVIDE AN INDEPENDENT BASIS FOR A CALL ON OTHER WATER RIGHTS.

THIS WATER RIGHT IS SUBJECT TO A PRIVATE AGREEMENT FILED IN WATER COURT CASE 41I-0050-R-2023.

13. Gaunt Spring is a developed spring because it uses manmade developments to bring additional flow to the surface. Rule 2(a)(64), W.R.C.E.R. The statement of claim identified two points of diversion – the location of the spring (NW § 35) and a secondary diversion out of the spring into a ditch (§ 34). As part of its *Motion to Amend*, Dooley provided additional evidence describing regular physical maintenance of the diversion structure which further supports Gaunt Spring being a developed spring. (Doc. 11, p. 6-7).

14. Jim Beck, on behalf of the Gaunt Spring Water Commissioner Jeff Knaff, used GPS technology to determine the primary point of diversion for claim 41I 132426-00 is the SENENW of § 35. (Doc. 11, p. 7, Exhibit 6). This legal land description was confirmed by Dooley’s expert witness, Kyle Mace, during the July 19, 2024 Rule 34 Site Inspection. (Doc. 11, p. 7, Exhibit 5 at 44:23-45:21).

15. Dooley’s *Motion to Amend* agrees with the DNRC’s issue remark that the maximum acres of claim 41I 132426-00 should be reduced from 10.00 acres to 5.00 acres.

16. Dooley’s *Motion to Amend* requests the flow rate be reduced to 120.00 gallons per minute (GPM). This figure is based on Water Commissioner Knaff’s measurements of the flows of Gaunt Spring. (Doc. 11, p. 9).

41I 27402-00

17. As described in the *Stipulation*, the parties agreed that Shindoll may seek the modifications set forth in its October 18, 2024 *Motion for Summary Judgment*.

18. Based on the evidence provided in Shindoll’s *Motion for Summary Judgment*, stock historically took water from the entire segment of the unnamed tributary

of the North Fork of Ray Creek in Section 35 – not just Gaunt Spring – which is located in the N2NW § 35 T8N R3E.

19. The *Stipulation* also requests the following issue remark be added to the claim 41I 27402-00 abstract:

THIS WATER RIGHT IS SUBJECT TO A PRIVATE AGREEMENT
FILED IN WATER COURT CASE 41I-0050-R-2023.

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. If a claimant agrees to reduce or limit a claim, the Water Court may accept the reduction or limitation without reviewing further evidence, unless an unresolved issue remark remains. Rule 17(c), W.R.Adj.R.

9. 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.

10. The Water Court is not bound by parties' settlement agreements. Any settlement reached by the parties is subject to review and approval by the Water Court. Rule 17(a), W.R.Adj.R.

11. After the issuance of a temporary preliminary decree and close of the objection period in a basin, a claimant may amend their Statement of Claim. Section 85-2-233(6), MCA.

12. Notice is required to other water users if a motion to amend may adversely affect other water rights. Section 85-2-233(6), MCA.

13. A claimant asserting an amendment to its claim has the burden to show that the historical use of the claim is accurately reflected by the requested amendment. *Nelson v. Brooks*, 2014 MT 120, ¶ 34, 375 Mont. 86, 329 P.3d 558.

CONCLUSIONS OF LAW

41I 132426-00

1. The issue remarks and objections overcome the prima facie status of claim 41I 132426-00. The *Motion to Amend* shows by a preponderance of the evidence that claim 41I 132426-00 should be modified as described above.

2. No further notice of these amendments are necessary because "all elements" of 41I 132426-00 were identified on the Basin 41I Objection List.

41I 27402-00

1. The objection and the evidence provided in the *Motion for Summary Judgment* overcome the prima facie status of claim 41I 27402-00. The evidence shows by a preponderance of the evidence that stock historically took water from the entire segment of the unnamed tributary of the North Fork of Ray Creek in Section 35 – not just Gaunt Spring – which is located in the N2NW § 35 T8N R3E.

RECOMMENDATIONS

1. Claim 41I 132426-00 should be modified as follows:

Flow Rate: ~~170.00 GPM~~ 120.00 GPM

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: ~~10.00~~ 5.00

Source Name: SPRING, UNNAMED TRIBUTARY OF UNNAMED TRIBUTARY OF NORTH FORK RAY CREEK

Source Type: ~~SURFACE-WATER~~ GROUNDWATER

ALSO KNOWN AS GAUNT SPRING

THE WATER FROM THIS SPRING IN THE RAY CREEK DRAINAGE IS INSUFFICIENT TO CONTRIBUTE WATER TO RAY CREEK AND THIS SPRING PROVIDES WATER EVEN THOUGH RAY CREEK MAY NOT BE RUNNING.

Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	SENENW	SENW	35	8N	3E	BROADWATER

Period of Diversion: APRIL 15 TO OCTOBER 31

Diversion Means: ~~HEADGATE~~ DEVELOPED SPRING

Place of Use:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	10.00 5.00		NWSE	34	8N	3E	BROADWATER
Total:	10.00 5.00						

2. The following information remark should be added to claim 41I 132426-00:
THE INCIDENTAL USE OF THIS RIGHT FOR STOCK IS LIMITED TO TIMES WHEN WATER IS DIVERTED FOR IRRIGATION AND DOES NOT PROVIDE AN INDEPENDENT BASIS FOR A CALL ON OTHER WATER RIGHTS.
3. The issue remarks should be removed from the claim 41I 132426-00 abstract.
4. The point of diversion and place of use for claim 41I 27042-00 should be modified to the N2NW § 35 T8N R3E.
5. The following information remark should be added to both claims:
THIS WATER RIGHT IS SUBJECT TO A PRIVATE AGREEMENT FILED IN WATER COURT CASE 41I-0050-R-2023.

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

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, ABOVE HOLTER DAM
BASIN 41I**

Water Right Number: 41I 27402-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: CONNIE SHINDOLL
PO BOX 607
TOWNSEND, MT 59644-0607

SHINDOLL ALBERT N TRUST
CONNIE SHINDOLL TRUSTEE
PO BOX 607
TOWNSEND, MT 59644-0607

Priority Date: DECEMBER 27, 1963

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 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: SPRING, UNNAMED TRIBUTARY OF UNNAMED TRIBUTARY OF NORTH FORK RAY CREEK

Source Type: SURFACE WATER

ALSO KNOWN AS SPRING NO. 3

THE WATER FROM THIS SPRING IN THE RAY CREEK DRAINAGE IS INSUFFICIENT TO CONTRIBUTE WATER TO RAY CREEK AND THIS SPRING PROVIDES WATER EVEN THOUGH RAY CREEK MAY NOT BE RUNNING.

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		N2NW	35	8N	3E	BROADWATER

Period of Diversion: MAY 1 TO NOVEMBER 30

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: MAY 1 TO NOVEMBER 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			N2NW	35	8N	3E	BROADWATER

Remarks:

THIS WATER RIGHT IS SUBJECT TO A PRIVATE AGREEMENT FILED IN WATER COURT CASE 41I-0050-R-2023.

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, ABOVE HOLTER DAM
BASIN 41I

Water Right Number: 41I 132426-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: DOOLEY LAND & LIVESTOCK, LLC
204 SACAJAWEA PEAK DRIVE
BOZEMAN, MT 59718-9392

Priority Date: AUGUST 19, 1912

Type of Historical Right: FILED

Purpose (Use): IRRIGATION
Irrigation Type: FLOOD

THE INCIDENTAL USE OF THIS RIGHT FOR STOCK IS LIMITED TO TIMES WHEN WATER IS DIVERTED FOR IRRIGATION AND DOES NOT PROVIDE AN INDEPENDENT BASIS FOR A CALL ON OTHER WATER RIGHTS.

Flow Rate: 120.00 GPM

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: 5.00

Source Name: SPRING, UNNAMED TRIBUTARY OF UNNAMED TRIBUTARY OF NORTH FORK RAY CREEK

Source Type: GROUNDWATER

ALSO KNOWN AS GAUNT SPRING

THE WATER FROM THIS SPRING IN THE RAY CREEK DRAINAGE IS INSUFFICIENT TO CONTRIBUTE WATER TO RAY CREEK AND THIS SPRING PROVIDES WATER EVEN THOUGH RAY CREEK MAY NOT BE RUNNING.

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		SENENW	35	8N	3E	BROADWATER	
Period of Diversion:		APRIL 15 TO OCTOBER 31					
Diversion Means:		DEVELOPED SPRING					
Period of Use:		APRIL 15 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	5.00		NWSE	34	8N	3E	BROADWATER
Total:		5.00					

Remarks:
THIS WATER RIGHT IS SUBJECT TO A PRIVATE AGREEMENT FILED IN WATER COURT CASE 41I-0050-R-2023.