

Montana Water Court
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FILED
03/10/2025
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
76HE-0312-P-2025
Lockman, Melissa
1.00

**IN THE WATER COURT OF THE STATE OF MONTANA
UPPER CLARK FORK DIVISION
SOUTH END OF THE BITTERROOT RIVER SUBBASIN (76HE)**

* * * * *

CLAIMANT: Robert Burke & Kimberly Boyer Living Trust

CASE 76HE-0312-P-2025
76H 152021-00

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

FINDINGS OF FACT

1. Claim 76H 152021-00 appeared in the Temporary Preliminary Decree for the Bitterroot River, South End (76HE) issued on May 25, 1994.

2. At the time the claim was examined (in the early 1990s) by the Department of Natural Resources and Conservation (DNRC), the DNRC found that ownership in the water rights database was not consistent with ownership of the underlying place of use.

3. To note the inconsistency, the DNRC place the following issue remark on the claim:

AS OF 06/28/90, THIS WATER RIGHT APPEARS TO BE OWNED BY LAWRENCE AND BEVERLY NICKISH, BEAVERTAIL LODGE WEST FORK RD, DARBY, MT 59829.

4. When the 76HE Temporary Preliminary Decree was issued, the record owners of claim 76H 152021-00 were Linnea and Thomas Johnson.

5. According to the water rights database, in 2006, the Johnsons transferred their ownership of claim 76H 152021-00 to Joseph Bell, in 2013, Mr. Bell transferred his ownership to the Patricia Eve Bell Revocable Living Trust, and in 2018, the Patricia Eve Bell Revocable Living Trust transferred its ownership to the Robert Burke and Kimberly Boyer Living Trust.

6. The Robert Burke and Kimberly Boyer Living Trust is the current owner of claim 76H 152021-00 in the water rights database. The Trust is also the owner of the underlying place of use.

7. Based on this information, it appears the ownership issue remark is outdated and should be removed from the claim without changes to the claim's ownership.

8. The Robert Burke and Kimberly Boyer Living Trust and Lawrence and Beverly Nickish should review claim 76H 152021-00 to ensure it accurately reflects the current ownership of the water right. If ownership is correct, no further action is needed. If ownership is not correct, one or both parties should object to this Master's Report and notify the Court of the current ownership.

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.

CONCLUSION OF LAW

1. The ownership issue remark does not overcome the prima facie status of claim 76H 152021-00. Based on the evidence before the Court, the ownership issue remark is outdated and the ownership of claim 76H 152021-00 is current.

RECOMMENDATION

1. The ownership issue remark should be removed from claim 76H 152021-00. All other issue remarks should remain on the claim and they will be resolved in the next decree.

A post decree abstract of the water right claim reflecting this recommendation is attached to this Report.

ELECTRONICALLY SIGNED AND DATED BELOW.

SERVICE VIA USPS MAIL

Burke, Robert & Kimberly Boyer Living
Trust
Burke Robert & Boyer Kimberly Trustees
2110 Artesia Blvd B133
Redondo Beach, CA 90278

Potential Owner

*Larence Nickish
Beverly Nickish
Beavertail Lodge, West Fork Rd
Darby, MT 59829*

SERVICE VIA ELECTRONIC MAIL

Garrett Musso
MT DNRC Post Exam &
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POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
SOUTH END SUBBASIN- BITTERROOT RIVER
BASIN 76H

Water Right Number: 76H 152021-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: BURKE, ROBERT & KIMBERLY BOYER LIVING TRUST
BURKE ROBERT & BOYER KIMBERLY TRUSTEES
2110 ARTESIA BLVD B133
REDONDO BEACH, CA 90278

Priority Date: JULY 1, 1964

Type of Historical Right: USE

Purpose (Use): DOMESTIC

Flow Rate: 10.00 GPM

*Volume: 0.01 AC-FT

Households: 1

Maximum Acres: 1.00

Source Name: BEAVERTAIL CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1		W2NENW	31	1N	21W	RAVALLI

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: BUCKET

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	1.00		W2NENW	31	1N	21W	RAVALLI
Total:	1.00						

Remarks:

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

THE FOLLOWING POTENTIAL ISSUES WERE IDENTIFIED DURING CLAIMS EXAMINATION OR DURING PREVIOUS WATER COURT PROCEEDINGS.

THIS CLAIM DOES NOT APPEAR TO REFLECT THE WATER RIGHT AS IT WAS BEFORE JULY 1, 1973. INFORMATION IN THE CLAIM FILE INDICATES THAT THE ONE ACRE OF LAWN AND GARDEN CLAIMED ON THIS DOMESTIC CLAIM WAS FIRST IRRIGATED IN 1978.