

41I-6018-A-2021

September 16, 2021

Montana Water Court

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

\* \* \* \* \*

CLAIMANT: Kiesling Family Living Trust

CASE 41I-6018-A-2021  
41I 132380-00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Clerk of the Montana Water Court. Please review this Report carefully.

You may file a written objection to this Master's Report if you disagree or find errors with the Master's Findings of Fact, Conclusions of Law, or Recommendations. The above stamped date indicates the date this Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules requires written objections to a Master's Report be filed within 10 days of the date of the Master's Report. If this Master's Report was mailed to you, Rule 6(d) of the Montana Rules of Civil Procedure provides an additional 3 days to the 10-day objection period.

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 this 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**

On March 1, 2021, Claimant Kiesling Family Living Trust filed their *Motion to Amend Water Right* for claim 41I 132380-00. On April 30, 2021, Claimant filed additional information supporting the *Motion*.

### FINDINGS OF FACT

1. Claim 41I 132380-00 is a sprinkler/flood irrigation claim for use on 10.00 acres in the NENESW of Section 36, T12N, R1W, Lewis and Clark County. The claim appeared in the Basin 41I Temporary Preliminary Decree with the following issue remarks:

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

THE CLAIMED PERIOD OF USE EXCEEDS THE USUAL GROWING SEASON FOR THIS CLIMATIC AREA WHICH IS APRIL 20 TO OCTOBER 10.

THE LEWIS AND CLARK COUNTY WATER RESOURCES SURVEY (1957) APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

THE PRIORITY DATE MAY BE QUESTIONABLE. THIS CLAIM IS FOR A USE RIGHT ON TROUT CREEK WITH A PRIORITY DATE PREDATING CASE NO. 16631, LEWIS AND CLARK COUNTY.

The issue remarks were not resolved during adjudication of the Basin 41I Temporary Preliminary Decree.

2. Claimant's *Motion* requests amendments to the place of use and maximum acres, flow rate, period of use, point of diversion, means of diversion, and period of diversion. The requested amendments generally refine the claim to more precisely define how it was historically used, however they are not strictly reductions within the claimed elements.

3. On May 14, 2021, the Court ordered Claimant to publish notice of its requested amendments.

4. On May 18, 2021, Claimant's counsel filed their *Submission of Public Notice*. The *Submission* indicated that notice would be published on May 19, 2021, May 21, 2021, and June 4, 2021. Based on these publication dates, the objection deadline is July 19, 2021.

5. On June 17, 2021, Claimant's counsel filed *Claimant's Update and Request for Guidance from Water Master Regarding Publication of Public Notice*. The *Update* stated that:

Due to a miscommunication between Claimant and Claimant's counsel, Claimant completed a separate publication of notice in the *Helena Independent Record* and the *Broadwater Reporter*; a copy of which from the *Independent Record* is attached hereto, showing that public notice was published in that newspaper on May 27, June 3 and 10, 2021 and stating the deadline to file any objections or

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responses to be August 10, 2021, 22 days after the July 19, 2021 deadline date published by Claimant's counsel.

6. Based on the conflicting objection deadlines, the Court filed its *Order Providing Guidance* stating that it would accept objections through the August 10, 2021, deadline. The *Order* was published on the Court's website with Claimant's *Motion*.

7. No objections were filed by the August 10, 2021, deadline.

8. Claimant's *Motion* requests the following amendments to claim 41I

132380-00:

Flow Rate: 170.00 GPM 143.00 GPM

Maximum Acres: 40.00 8.40

Period Of Use: ~~JANUARY 01 TO DECEMBER 31~~ APRIL 20 TO OCTOBER 10

Point of Diversion:

ID	Govt Lot	QtrSec	Sec	Twp	Rge	County
1	<u>NESWSW</u>	<u>NENESW</u>	36	12N	1W	Lewis & Clark
2		<u>NWSESWSW</u>	36	<u>12N</u>	<u>1W</u>	<u>Lewis &amp; Clark</u>

Means of Diversion: Headgate Pump

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>	
1	1.40	10.00 <u>NESESW</u>	<u>NENESW</u>	36	12N	1W	Lewis & Clark
2	5.60		<u>NESWSW</u>	36	12N	1W	<u>Lewis &amp; Clark</u>
3	0.60		<u>N2SESWSW</u>	36	12N	1W	<u>Lewis &amp; Clark</u>
4	0.70		<u>SENWSWSW</u>	36	12N	1W	<u>Lewis &amp; Clark</u>
5	0.01		<u>SESENWSW</u>	36	12N	1W	<u>Lewis &amp; Clark</u>
Total: 10.00 <u>8.40</u>							

Add Place of Use Remark:

THE PLACE OF USE IS MORE  
PARTICULARLY DESCRIBED AS COS  
182543, TRACT 12 IN H.E.S. NO. 900.

9. Claimant's *Motion* included an affidavit from Victor Kiesling. Mr. Kiesling owned the property at issue when the Statement of Claim for claim 41I 132380-00 was filed.

10. During the Statement of Claim filing period, Mr. Kiesling was living in Germany while he served in the Armed Forces. *Kiesling Affidavit*, ¶ 2. Because Mr. Kiesling was not able to file the Statement of Claim himself, his father-in-law and attorney prepared the Statement of Claim on his behalf. *Id.* at ¶ 3. Due to communication limitations in 1982, Mr. Kiesling was unable to review the Statement of Claim before it was filed. *Id.*

11. The Kieslings purchased Tract 12 in Homestead Entry Survey (H.E.S.) 900, C.O.S. 182543, in 1982. Tract 12 is located in the NWSESW, SWSW, and SESENWSW of Section 36. *Id.* This property was incorrectly described as being in the NENESW of Section 36 on the Statement of Claim. The Kieslings never had an ownership interest in the NENESW of Section 36. *Id.* at ¶ 4.

12. When Mr. Kiesling left the Armed Forces and returned to the United States, his address was not updated with the DNRC, so he did not receive notice of the DNRC's 1990 review of the claim or the issuance of the Basin 41I Temporary Preliminary Decree. *Id.* at ¶ 5.

13. The amendments to the point and means of diversion more accurately describe where and how water was historically diverted from Trout Creek.

14. The point of diversion and means of diversion were originally claimed as follows:

*Point of Diversion:*

<u>ID</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENESW		36	12N	1W Lewis & Clark

*Means of Diversion:* Pump

15. The *Motion* requests the following amendments to the point of diversion and means of diversion:

*Point of Diversion:*

<u>ID</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENESW		36	12N	1W Lewis & Clark
<u>2</u>		<u>SW</u>	<u>NWSESWSW</u>	<u>36</u>	<u>12N</u>	<u>1W</u> <b>Lewis &amp; Clark</b>

*Means of Diversion:* Headgate Pump

*Point of Diversion Information Remark:* **WATER IS DIVERTED AT TRANSITORY PUMP LOCATIONS THROUGHOUT THE PLACE OF USE.**

16. As described by Mr. Kiesling:

6. The statement of claim for water right 411 132380-00 claims both sprinkler and flood irrigation and the use of a pump and pipeline along with a ditch. Prior to July 1, 1973, York Road was realigned which interfered with the ditch and original point of diversion. Once the headgate and upper portions of the ditch were no longer operable, my property was irrigated using sprinklers and a movable pump located in the creek on my property. Water was also pumped into the ditch on my property to flood the property located north of Trout Creek

17. The amendments to the place of use more accurately define the location of Tract 12 and the 8.40 acres historically irrigated by the claim.

18. As described above, a 1957 aerial photograph review by the DNRC did not show irrigation in the NENESW of Section 36. However, because the Kiesling property is not located in the NENESW of Section 36, the aerial photograph does not mean there was no irrigation under claim 411 132380-00 in 1957.

19. In addition to Mr. Kiesling's affidavit, Claimant also filed an affidavit from Jim Gilman. Mr. Gilman is a private water rights consultant who has 30 years of experience as the Adjudication Bureau Chief with the DNRC. Mr. Gilman reviewed

claim 41I 132380-00 and three historical aerial photographs – one from May 8, 1947, one from August 13, 1956, and one from August 19, 1970. *Gilman Affidavit*, ¶ 5.

20. Mr. Gilman was unable to find active irrigation on the May 8, 1947, photograph, but reasoned that photograph was likely taken to early in the season to show active irrigation. *Id.* at ¶ 6.

21. Mr. Gilman was able to find clear, active irrigation on the Kiesling property in the August 13, 1956, and August 19, 1970, photographs. *Id.* at ¶ 7.

#### 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. 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.

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

12. 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

1. By publishing notice of the requested amendments, Claimant satisfied the notice requirement of §85-2-233(6), MCA. No water user objected to the amendments.

2. Claimant showed by a preponderance of the evidence that the modifications proposed in the *Motion* more accurately reflect the historical use of claim 41I 132380-00. The historically accurate point of diversion, means of diversion, flow rate, maximum acres, and place of use are as described in Finding of Fact No. 8. The changes requested in the *Motion* arise out of the same conduct, transaction, or occurrence specified on the original Statements of Claim, are based on the same operative facts specified in the Statements of Claim, and merely make more specific that which was already claimed on the original Statements of Claim.

3. The acres irrigated issue remark does not overcome the *prima facie* status of claim 41I 132380-00. The clear evidence of active irrigation on the Kiesling property in the 1957 and 1970 aerial photographs supports the 8.40 irrigated acres in the amendment. Because the issue remark does not overcome the *prima facie* status of the

claim and the remark was noticed in the Basin 41I Temporary Preliminary Decree, the acres irrigated issue remark should be removed from the claim.

4. The amendments to the flow rate and period of use resolve the flow rate and period of use issue remarks on the claim. Because the issue remarks are resolved and were noticed in the Basin 41I Temporary Preliminary Decree, the flow rate and period of use issue remarks should be removed from the claim.

5. The priority date issue remark does not overcome the *prima facie* status of the claim.

#### RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

A post decree abstract of the water right claim reflecting the recommended changes is attached to this Report and a copy of the map depicting the corrected point of diversion and place of use has been placed in the claim file.

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Melissa Lockman  
Water Master

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

**Water Right Number:** 41I 132380-00 STATEMENT OF CLAIM  
**Version:** 2 -- POST DECREE  
**Status:** ACTIVE

**Owners:** KIESLING FAMILY LIVING TRUST  
PO BOX 2321  
GIG HARBOR, WA 98335 4321

**Priority Date:** MAY 15, 1926

**Type of Historical Right:** USE

**Purpose (Use):** IRRIGATION

**Irrigation Type:** SPRINKLER/FLOOD

**Flow Rate:** 143.00 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:** 8.40

**Source Name:** TROUT 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		NESWSW	36	12N	1W	LEWIS AND CLARK
	Period of Diversion:	APRIL 20 TO OCTOBER 10				
	Diversion Means:	PUMP				
2		NWSESW	36	12N	1W	LEWIS AND CLARK
	Period of Diversion:	APRIL 20 TO OCTOBER 10				
	Diversion Means:	PUMP				
	Period of Use:	APRIL 20 TO OCTOBER 10				

**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	1.40		NWSESW	36	12N	1W	LEWIS AND CLARK
2	5.60		NESWSW	36	12N	1W	LEWIS AND CLARK
3	0.60		N2SESESW	36	12N	1W	LEWIS AND CLARK
4	0.70		SENWSWSW	36	12N	1W	LEWIS AND CLARK
5	0.10		SESENWSW	36	12N	1W	LEWIS AND CLARK
<b>Total:</b>	<b>8.40</b>						

THE PLACE OF USE IS MORE PARTICULARLY DESCRIBED AS COS 182543, TRACT 12 IN H.E.S. NO. 900.

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**Remarks:**

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

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

**Water Right Number:** 41I 132380-00 STATEMENT OF CLAIM  
**Version:** 2 -- POST DECREE  
**Status:** ACTIVE

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PO BOX 2321  
GIG HARBOR, WA 98335 4321

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**Climatic Area:** 4 - MODERATELY LOW

**Maximum Acres:** 8.40

**Source Name:** TROUT 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		NESWSW	36	12N	1W	LEWIS AND CLARK
	Period of Diversion:	APRIL 20 TO OCTOBER 10				
	Diversion Means:	PUMP				
2		NWSESW	36	12N	1W	LEWIS AND CLARK
	Period of Diversion:	APRIL 20 TO OCTOBER 10				
	Diversion Means:	PUMP				
	Period of Use:	APRIL 20 TO OCTOBER 10				
	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	1.40		NWSESW	36	12N	1W	LEWIS AND CLARK
2	5.60		NESWSW	36	12N	1W	LEWIS AND CLARK
3	0.60		N2SESW	36	12N	1W	LEWIS AND CLARK
4	0.70		SENWSWSW	36	12N	1W	LEWIS AND CLARK
5	0.10		SESENWSW	36	12N	1W	LEWIS AND CLARK
<b>Total:</b>	<b>8.40</b>						

THE PLACE OF USE IS MORE PARTICULARLY DESCRIBED AS COS 182543, TRACT 12 IN H.E.S. NO. 900.

---

**Remarks:**

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Kiesling Property T12N R1W Section 36 HES 900 Tract 12

