

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
JEFFERSON RIVER BASIN (41G)
PRELIMINARY DECREE

* * * * *

CLAIMANT: Estate of James P. Kearney

CASE 41G-0537-R-2022
41G 202322-00

OBJECTOR: United States of America (USDA 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

FINDINGS OF FACT

1. Claim 41G 202322-00 appeared in the 41G Preliminary Decree issued February 15, 2018. It received an objection from the United States Forest Service.

2. An initial status conference was held on November 9, 2022. Jennifer Najjar appeared on behalf of the United States. The claimant, Estate of James P. Kearney, did not appear. A settlement period was provided for the parties to attempt to negotiate a resolution.

3. On March 6, 2023, the United States filed a Motion for a Show Cause Order. The United States indicates it has been unable to reach Claimant or Potential Claimant, and neither Claimant or Potential Claimant have contacted counsel for the United States.

4. To resolve its objection, the United States contends that place of use no. 2 should be removed from the claim and that the period of use and period of diversion should be modified from year-round to April 30 – November 15.

5. In support, the United States provides a Declaration of Rebecca A. Lloyd. Lloyd is a Soil Scientist and Hydrologist who has been employed by the United States Forest Service since 2015. In her declaration, Lloyd includes her assessment of the historical water use under claim 41G 202322-00 and attaches maps showing the claimed point of diversion and places of use.

6. In its Motion, the United States explains that it is unlikely that place of use no. 2 was ever used. To convey water from Bear Gulch to place of use no. 2 in the SE of Section 1, T3S, R5W, the claimant would need a Special Use Permit for a conveyance system that crosses National Forest System lands. The United States indicates that there is no record that Claimant ever possessed a Special Use Permit for the claimed conveyance system. Nor is there any record that the claimant has had a permit from the Bureau of Land Management (BLM) for a mining claim since its permits were closed in 1988.

The United States further provides that the topography between the point of diversion and place of use no. 2 is not conducive to a pipeline (the claimed means of diversion) and there is no evidence of a pipeline in aerial imagery.

7. The United States also asserts that the period of use and period of diversion should be changed from year-round to April 30 – November 15. In support, the United States explains that the location of the point of diversion and place of use is at about 8,000 feet in elevation and it is not possible for water to be used or diverted year-round at this location. The United States asserts that attempts to use the pipeline between November and early May would result in water freezing in the pipe.

8. A show cause filing deadline was set for the claimant to show cause why claim 41G 202322-00 should not be modified as proposed by the United States. The Order setting the deadline stated that if nothing was filed by April 28, 2023, the Court would conclude that the claimant concurs with the changes proposed by the United States. Nothing was filed by the deadline.

9. Claim 41G 202322-00 should be modified pursuant to the Show Cause Order.

CONCLUSIONS OF LAW

1. A properly filed claim of an existing right or an amended claim of existing right is *prima facie* proof of its content. § 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. Rule 19, W.R.ADJ.R.

2. The United States provided sufficient evidence and explanation to establish that place of use no. 2 should be removed from claim 41G 202322-00 and that the period of use and diversion should be modified to April 30 – November 15.

3. If a claimant fails to comply with an Order issued by the Water Court in its review of issue remarks, including an Order issued by a Water Master appointed by the Court, the Court on its own initiative may amend or dismiss the claim to conform with

information in the claim file or information obtained as part of the adjudication process. Section 85-2-248(9) MCA. The claimant did not comply with the Court's orders to respond to court deadlines and attend court conferences. The information before the court indicates that claim 41G 202322-00 should be modified as provided above.

RECOMMENDATIONS

1. Claim 41G 202322-00 should be modified as provided above.

A Post Decree Abstract of Water Right Claim is served with the Report to confirm that the changes have been made in the state's centralized database.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Estate of James P. Kearney
% Mike Kearney
1614 B St.
Butte, MT 59701

Potential Owners:

Ryan Kearney
James Kearney
1016 Starburst Lane
Stevensville, MT 59870

Service via Electronic Mail:

Jennifer A. Najjar
US Dept of Justice, ENRD-NRS
PO Box 7611
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MontanaBasins.ENRD@USDOJ.GOV

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
JEFFERSON RIVER
BASIN 41G

Water Right Number: **41G 202322-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:
KEARNEY, JAMES P ESTATE OF
% MIKE KEANEY
1614 B ST
BUTTE, MT 59701

Priority Date: JANUARY 10, 1917

Type of Historical Right: USE

Purpose (use): MINING

Flow Rate: 75.00 GPM

Volume: THIS WATER RIGHT IS LIMITED TO THE VOLUME OF WATER HISTORICALLY USED FOR MINING PURPOSES.

Source Name: BEAR GULCH

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		NENW	12	3S	5W	MADISON

Period of Diversion: APRIL 30 TO NOVEMBER 15

Diversion Means: PIPELINE

Period of Use: APRIL 30 TO NOVEMBER 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			NENW	12	3S	5W	MADISON

Remarks:

THE TOWNSHIP IS UNSURVEYED. THE LEGAL LAND DESCRIPTION HAS BEEN ESTIMATED.