

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

\*\*\*\*\*

CLAIMANT: Blenton Ranch Co.

**CASE 41K-0311-R-2024**

41K 96659-00

41K 96660-00

NOTICE OF INTENT TO APPEAR: Broken O Land &  
Livestock LLC

**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. Claims 41K 96659-00 and 41K 96660-00 are owned by Blenton Ranch Co. The claims appeared in the 41K Preliminary Decree with several issue remarks placed on the claims by the Department of Natural Resources (DNRC). Broken O Land & Livestock filed a Notice of Intent to Appear for both claims.

2. On October 21, 2024 the Claimant filed an Unopposed Motion to Amend to Resolve Issue Remarks and Notices of Intent to Appear. The Motion to Amend requests modifications to the claims that address the issue remarks appearing on the claims.

3. Claims 41K 96659-00 and 41K 96660-00 are supplemental irrigation claims that identify identical places of use consisting of 308 acres. Claim 41K 96659-00 has an April 5, 1878 priority date; Claim 41K 96660-00 has a May 15, 1871 priority date. Both claims appeared in the Preliminary Decree with the following four issue remarks:

THIS CLAIM PRESENTS ISSUES OF FACT AND LAW THAT MAY BE ADDRESSED AT THE OBJECTION STAGE. IT APPEARS THAT 155.00 ACRES ARE ACTUALLY IRRIGATED AND PROBLEMS COULD EXIST WITH FLOW RATE AND VOLUME.

DITCH NAMES WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

POINT OF DIVERSION NO. 2 APPEARS TO BE INCORRECT. THE POINT OF DIVERSION APPEARS TO BE IN THE SWNESE SEC 17 TWP 20N RGE 6W LEWIS AND CLARK COUNTY.

POINT OF DIVERSION NO. 3 APPEARS TO BE INCORRECT. THE POINT OF DIVERSION APPEARS TO BE IN THE NWSNW SEC 16 TWP 20N RGE 6W LEWIS AND CLARK COUNTY.

**Place of Use Issue Remarks**

4. To address the first issue remark, the claimant agrees to reduce the place of use for each claim from 308 acres to 194 acres. The claimant explains that 194 acres accurately represents the historical use of the claims and in support points to the original

issue remarks appearing on the claims in the Basin 41K Temporary Preliminary Decree, previous Water Court proceedings involving the claims, field notes from the 1957 Water Resource Survey, and a 1977 USDA aerial photograph.

5. The DNRC examination of claims 41K 96659-00 and 41K 96660-00 during preparation of the Temporary Preliminary Decree resulted in place of use issue remarks being added to claims 41K 96659-00 and 41K 96660-00. Claim 41K 96659-00 originally claimed 330 acres. An issue remark was added saying it appeared only 221 acres were actually irrigated. Claim 41K 96660-00 originally claimed 290 acres. An issue remark was added saying it appeared only 180 acres were actually irrigated.

6. During Temporary Preliminary Decree proceedings, the place of use for claims 41K 96659-00 and 41K 96660-00 was at issue in Case 41K-212. The claimant at the time, Zimmer Ranch, filed an affidavit on October 10, 1996 stating that the place of use should be modified as provided below to accurately depict historical use prior to July 1, 1973.

<u>ACRES</u>	<u>QTR. SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>
30 Acres	SENE	Section 17	T20N	R6W	Lewis & Clark County
5 Acres	E2SENE	Section 17	T20N	R6W	Lewis & Clark County
40 Acres	NESE	Section 17	T20N	R6W	Lewis & Clark County
40 Acres	NWNW	Section 16	T20N	R6W	Lewis & Clark County
40 Acres	SWNW	Section 16	T20N	R6W	Lewis & Clark County
40 Acres	SESW	Section 9	T20N	R6W	Lewis & Clark County
80 Acres	S2SE	Section 9	T20N	R6W	Lewis & Clark County
33 Acres	NWSE	Section 9	T20N	R6W	Lewis & Clark County

The Water Master requested assistance from the DNRC to determine how many acres were historically irrigated compared with the affidavit filed in Case 41K-212. The DNRC examiner found 155 acres were irrigated prior to July 1, 1973. Accordingly, the Water Master modified the issue remarks appearing on both claims to state it appeared only 155 acres were actually irrigated. The issue remarks remained on the claims to be addressed at the next decree.

7. At the same time, the Water Master in Case 41K-212 accepted the place of use modification requested by the claimant. The parties in Case 41K-212 withdrew their

objections contingent on the Court's acceptance of the terms of the October 10, 1996 affidavit.

8. The 1996 affidavit was sufficient to overcome the prima facie status of claims 41K 96659-00 and 41K 96660-00 for the purposes of modifying the place of use during proceedings in 41K-212. The issue remarks remained on the claims because at that time, resolving issue remarks was discretionary. The issue remarks did not result in any objections being filed to claims 41K 96659-00 and 41K 96660-00 during the 41K Preliminary Decree Objection Period. The DNRC memorandum resulting in the issue remarks did not provide any information concerning the procedures or evidence it used in verifying 155 acres. The issue remarks do not overcome the prima facie status of the claims and should be removed.

9. The Claimant requests to reduce the place of use for claims 41K 96659-00 and 41K 96660-00 during these proceedings from 308 acres to 194 acres as, which may be accepted without further presentation of evidence.

#### **Point of Diversion Issue Remarks**

10. Claims 41K 96659-00 and 41K 96660-00 received issue remarks that state point of diversion number two appears to be in the SWNESE of Section 17, 20N, 6W and point of diversion number three appears to be in the NWSNW of Section 16, 20N, 6W. The Claimant indicates that it agrees with the issue remarks and requests the points of diversion be corrected accordingly.

#### **Ditch Names Issue Remarks**

11. The issue remarks concerning ditch names are considered notice issue remarks. The purpose is to provide notice that the ditch names were modified during claims examination. The issue remarks have served their purpose and should be removed from the claim abstracts.

#### **Claim 41K 96660-00 Priority Date Issue Remark**

12. Claim 41K 96660-00 received an additional issue remark stating:

THE CLAIMED PRIORITY DATE MAY BE QUESTIONABLE. THE PRIORITY DATE ON THE SUBMITTED DECREE IS 1880.

Claim 41K 96660-00 identifies a May 15, 1871 priority date. The claimant explains that the right is based on a right for 2.5 cfs from the South Fork of the Sun River decreed to Eugenie A. Hogan and Augusta M. Murphy in the McIver Decree. The claimant's assertion is supported by excerpts from the McIver Decree (Case No. 4742, Cascade County) attached to the statement of claim form for 41K 96660-00.

*A* That the grantors and predecessors in interest of the defendants Eugenie A. Hogan and Augusta M. Murphy, for the purpose of irrigating a portion of said lands, did, on the 15th day of May, 1871, appropriate an additional two and one-half (2½) cubic feet of water per second, or its statutory equivalent of one hundred (100) statutory inches, of the waters of the South Fork of said Sun River, in said Lewis and Clark

It is not clear why the DNRC added the priority date issue remark. Claim 41K 96660-00 is the only claim in this Basin with a May 15, 1871 priority date. The priority date issue remark does not overcome the prima facie status of the claim and should be removed.

### **Addition of Point of Diversion No. 5**

13. As part of its Motion to Amend, the claimant requests the addition of a fifth point of diversion in the NWNWSW of Section 16, T20N, R6W. The claimant explains that this fifth point of diversion is necessary to serve the places of use in the south half of Section 9, T20N, R6W (places of use IDs 6-8).

In support, the claimant provides a Declaration of John Westenberg who is a Senior Water Rights Specialist employed by WGM Group, Inc. Westenberg indicates that he conducted a site visit of the Blenton Ranch in August 2024. During the site visit he determined that a fifth point of diversion should be identified on the abstract because it is necessary to serve the places of use in the S2 of Section 9. Attachment 1 to Westenberg's Declaration is a map depicting the points of diversion, the ditches, and the places of use associated with claims 41K 96659-00 and 41K 96660-00.

Also attached to Westenberg's Declaration is a copy of the 1957 WRS Map for Lewis and Clark County, depicting the Boone (Dahl-Eberl) Ditch and confirming that it historically provided for private irrigation in the South of Section 9, T20N, R6W (attachment 3). To corroborate the historic use of the Boone (Dahl-Eberl) Ditch point of diversion, Westenberg points to claim 41K 215245-00, which is owned by the Montana State Board of Land Commissioners. Claim 41K 215245-00 also uses the Boone (Dahl-Eberl) Ditch and identifies the point of diversion as being in the NWNWSW of Sec 16, T20N, R6W.

The requested addition of a fifth point of diversion in the NWNWSW of Sec 16, T20N, R6W is supported by evidence of historical use. The addition of the point of diversion does not fundamentally change the historic use of the water or significantly change how the claims appeared in the Preliminary Decree and therefore additional notice is not required. A fifth point of diversion should be added to claims 41K 96659-00 and 41K 96660-00 to reflect historic use of the Boone (Dahl-Eberl) Ditch to convey water to places of use IDs 6-8.

#### CONCLUSIONS OF LAW

1. A properly filed Statement of Claim for Existing Water 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.

The Claimant provided sufficient evidence to support the requested addition of a fifth point of diversion in the NWNWSW of Section 16, T20N, R6W by a preponderance of the evidence. Notice of potential changes to the points of diversions for these claims was provided on the Basin 41K Objection List. The addition of a fifth point of diversion is necessary to describe how water has historically been conveyed to the place of use already recognized under the claim. Adding the requested fifth point of diversion does not fundamentally change the historic use of the water rights, nor does it significantly

change how the claims appeared in the Preliminary Decree. No notice is required under Section 85-2-233(6), MCA. See Circle S Ranch, Inc., 2019 Mont. Water LEXIS 8, \*5.

2. Section 85-2-248(2), MCA requires the Water Court to resolve all issue remarks that are not resolved through the objection process. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. § 85-2-248(3), MCA.

The place of use issue remarks that appeared on the abstracts for claims 41K 96659-00 and 41K 96660-00 in the Basin 41K Preliminary Decree do not overcome the prima facie status of the claims. The issue remarks should be removed from the claims.

The claimant agrees with the point of diversion issue remarks and requests the points of diversion be corrected pursuant to the remarks. The issue remarks overcome the prima facie status of the claim. The points of diversion legal land descriptions should be updated accordingly, and the point of diversion issue remarks removed.

The priority date issue remark appears to have been added to claim 41K 96660-00 in error. It does not overcome the prima facie status of the claim and should be removed.

3. If a claimant agrees to reduce or limit an element of a claim, the water court may accept the claimant's requested reduction or limitation without further presentation of evidence, unless there is an unresolved issue remark on the claim, in which case § 85-2-248, MCA must be applied. Rule 17(c), W.R.Adj.R.

The issue remarks appearing on claims 41K 96659-00 and 41K 96660-00 should be considered resolved as discussed above, meaning there are no unresolved issue remarks on these claims. Therefore, the claimant's request to reduce the place of use for claims 41K 96659-00 and 41K 96660-00 should be accepted without further presentation of evidence.

### RECOMMENDATIONS

1. The claimant's motion to amend to resolve issue remarks should be accepted by the Court.

2. The place of use for claims 41K 96659-00 and 41K 96660-00 should be reduced from 308 acres to 194 acres.

3. A fifth point of diversion in the should be added to claims 41K 96659-00 and 41K 96660-00.

4. The issue remarks should be removed from claims 41K 96659-00 and 41K 96660-00.

Post Decree Abstracts of Water Right Claims are served with the Report to confirm that the recommended corrections have been made in the state's centralized record system.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

**Service via Electronic Mail:**

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megan@bkbh.com



**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
SUN RIVER  
BASIN 41K**

**Water Right Number:** 41K 96659-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** BLENTON RANCH CO  
PO BOX 308  
AUGUSTA, MT 59410-0308

**Priority Date:** APRIL 5, 1878

**Type of Historical Right:** DECREED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 5.83 CFS

**\*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:** 194.00

**\*Source Name:** ELK CREEK

**Source Type:** SURFACE WATER  
ALSO KNOWN AS SUN RIVER, SOUTH FORK.

**\*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		SWSWNE	30	20N	6W	LEWIS AND CLARK
<b>Period of Diversion:</b>	APRIL 15 TO OCTOBER 15					
<b>Diversion Means:</b>	HEADGATE					
<b>Ditch Name:</b>	HOGAN DITCH					
2		SWNESE	17	20N	6W	LEWIS AND CLARK
<b>Period of Diversion:</b>	APRIL 15 TO OCTOBER 15					
<b>Diversion Means:</b>	HEADGATE					
<b>Ditch Name:</b>	ZIMMER DITCH					
3		NWSENW	16	20N	6W	LEWIS AND CLARK
<b>Period of Diversion:</b>	APRIL 15 TO OCTOBER 15					
<b>Diversion Means:</b>	HEADGATE					
<b>Ditch Name:</b>	ZIMMER DITCH					
4		NENWNW	16	20N	6W	LEWIS AND CLARK
<b>Period of Diversion:</b>	APRIL 15 TO OCTOBER 15					
<b>Diversion Means:</b>	HEADGATE					
<b>Ditch Name:</b>	ZIMMER DITCH					
5		NWNWSW	16	20N	6W	LEWIS AND CLARK

**Period of Diversion:** APRIL 15 TO OCTOBER 15  
**Diversion Means:** HEADGATE  
**Ditch Name:** BOONE (DAHL-EBERL) DITCH  
**Period of Use:** APRIL 15 TO OCTOBER 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	19.25		SENE	17	20N	6W	LEWIS AND CLARK
2	1.50		E2SENE	17	20N	6W	LEWIS AND CLARK
3	6.50		NESE	17	20N	6W	LEWIS AND CLARK
4	32.00		NWNW	16	20N	6W	LEWIS AND CLARK
5	27.50		SWNW	16	20N	6W	LEWIS AND CLARK
6	28.00		SESW	9	20N	6W	LEWIS AND CLARK
7	77.00		S2SE	9	20N	6W	LEWIS AND CLARK
8	2.25		NWSE	9	20N	6W	LEWIS AND CLARK
<b>Total:</b>	<b>194.00</b>						

**Remarks:**

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

96659-00                      96660-00

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE ASSOCIATED WHICH MEANS THE RIGHTS SHARE THE SAME PLACE OF USE.

14710-00                      96659-00

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
SUN RIVER  
BASIN 41K**

**Water Right Number:** 41K 96660-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** BLENTON RANCH CO  
PO BOX 308  
AUGUSTA, MT 59410-0308

**Priority Date:** MAY 15, 1871

**Type of Historical Right:** DECREED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 2.50 CFS

**\*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:** 194.00

**\*Source Name:** ELK CREEK

**Source Type:** SURFACE WATER

ALSO KNOWN AS SUN RIVER, SOUTH FORK.

**\*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		SWSWNE	30	20N	6W	LEWIS AND CLARK
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<b>Ditch Name:</b>	ZIMMER DITCH					
3		NWSENW	16	20N	6W	LEWIS AND CLARK
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<b>Period of Diversion:</b>	APRIL 15 TO OCTOBER 15					
<b>Diversion Means:</b>	HEADGATE					
<b>Ditch Name:</b>	ZIMMER DITCH					
5		NWNWSW	16	20N	6W	LEWIS AND CLARK

**Period of Diversion:** APRIL 15 TO OCTOBER 15  
**Diversion Means:** HEADGATE  
**Ditch Name:** BOONE (DAHL-EBERL) DITCH  
**Period of Use:** APRIL 15 TO OCTOBER 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	19.25		SENE	17	20N	6W	LEWIS AND CLARK
2	1.50		E2SENE	17	20N	6W	LEWIS AND CLARK
3	6.50		NESE	17	20N	6W	LEWIS AND CLARK
4	32.00		NWNW	16	20N	6W	LEWIS AND CLARK
5	27.50		SWNW	16	20N	6W	LEWIS AND CLARK
6	28.00		SESW	9	20N	6W	LEWIS AND CLARK
7	77.00		S2SE	9	20N	6W	LEWIS AND CLARK
8	2.25		NWSE	9	20N	6W	LEWIS AND CLARK
<b>Total:</b>	<u>194.00</u>						

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**Remarks:**

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

96659-00

96660-00