

Montana Water Court  
PO Box 1389  
Bozeman, MT 59771-1389  
(406) 586-4364  
1-800-624-3270  
watercourt@mt.gov

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
CUT BANK CREEK BASIN 41L

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CLAIMANTS: Wendy S. Kennedy; James R. Kennedy

OBJECTORS: Blackfeet Tribe; United States of America (Bureau of  
Indian Affairs)

41L-0074-P-2017  
41L 203003-00

**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

### Statement of the case

The Blackfeet Tribe and the United States of America (Bureau of Indian Affairs) filed objections to all elements of stock claim 41L 203003-00.

The claim's point of diversion and place of use are within the boundaries of the Blackfeet Reservation. Pursuant to an Order directing the Department of Natural Resources and Conservation (DNRC) examination of such claims, the claim appeared in the Preliminary Decree for Basin 41L with an issue remark stating it was not clear whether the claim was state-based or part of the Tribal Water Right as defined by the Blackfeet Tribe-Montana-United States Compact.<sup>1</sup> Sections 85-20-1501, et al. MCA.

On June 24, 2024, the parties filed a Stipulation for the Resolution of Objections. Montana law requires the Water Court to resolve objections and issue remarks.

### Issues

1. Should the court accept the stipulated terms?
2. Is the issue remark on claim 41L 203003-00 resolved?

### Findings of fact

1. The historical point of diversion and place of use for claim 41L 203003-00 should be refined to the S2SENESE of Section 34 and the SWSWNWSW of Section 35, Township 34 North, Range 9 West.
2. The priority date for claim 41L 203003-00 should be reduced to December 12, 1918.
3. Claim 41L 203003-00 is a state-based claim.

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<sup>1</sup> See Order Establishing Procedures for Examination of Claim Located within the Exterior Boundaries of the Blackfeet Indian Reservation and Order Pursuant to Section 85-2-243, MCA, Concerning Resolution of the P800 Issue Remark for Claims Located within the Exterior Boundaries of the Blackfeet Indian Reservation (Basins 40F, 40T, 41L, 41M) (March 29, 2013).

## **Principles of law**

1. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. Prima facie proof may be overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R. A preponderance of the evidence is a “modest standard” and is evidence that demonstrates the fact to be proved is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 348, 240 P.3d 628.

2. The Montana Water Court is permitted to use information submitted by the Department of Natural Resources and Conservation, the statement of claim, information from approved compacts, and any other data obtained by the Court to evaluate water right claims. Section 85-2-231(2), MCA.

3. Settlement, including the documents filed by a claimant where the claimant is the only party, is subject to review and approval by the Water Court. Rule 17(a), W.R.Adj.R.

4. The Water Court may accept a settlement agreement that reduces or limits an element of a claim and need not determine whether the burden of proof is met unless there is an unresolved issue remark on the claim. Rule 17(c), W.R.Adj.R.

5. When resolving issue remarks, the Montana 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.

6. 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. Section 85-2-248(3), MCA.

## **Analysis**

### **Issue 1 – acceptance of stipulated terms**

The parties stipulated to a refined point of diversion and the place of use legal land description and a reduced priority date for claim 41L 203003-00.

## Conclusions of law

The evidence entered into the record is a reduction within the parameters of statement of claim 41L 203003-00, justifies the modifications to the claim, and resolves the objections to the claim. The stipulated terms should be accepted by the court.

## Issue 2 – issue remark resolution

Claim 41L 203003-00 appeared in the Preliminary Decree with the following issue remark:

IT IS NOT CLEAR WHETHER THIS CLAIM IS A STATE-BASED WATER RIGHT OR PART OF THE TRIBAL WATER RIGHT AS DEFINED IN THE BLACKFEET TRIBE - MONTANA COMPACT. ADDITIONAL EVIDENCE MAY BE REQUIRED BEFORE THIS CLAIM CAN BE DECREED.

The Stipulation explains:

- Mr. Kennedy conveyed most of the property identified by the point of diversion and place of use legal land descriptions to the Blackfeet Tribe. The refined stipulated legal land description reflects only the property owned by Mr. Kennedy.
- The priority date should be reduced to the date Mr. Kennedy’s property left trust status.

Based upon the foregoing modifications, the parties agree claim 41L 203003-00 is a state-based claim and “not part of the Tribal Water Right as defined in the Blackfeet Tribe Water Rights Compact.”

## Conclusion of law

The referenced issue remark is resolved.

## Recommendations

Stock claim 41L 203003-00 should be modified as follows to accurately reflect historical use.

**PRIORITY DATE:**<sup>2</sup>

~~JUNE 1, 1899~~

**DECEMBER 12, 1918**

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<sup>2</sup> Based upon the explanation for the modified priority date, the type of historical right for claim 41L 203003-00 should be “use.” This correction will not be implemented because Final Decree abstracts do not include type of historical right.

**POINT OF DIVERSION AND PLACE OF USE:**

<u>ACRES</u>	<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
		S2SENESE	34	34N	9W	GLACIER
		SWSWNWSW	35	34N	9W	GLACIER

The issue remark should be removed from the claim abstract.

A Post Decree Abstract of Water Right Claim accompanies this report to confirm implementation of the recommendations in the state's centralized water right record system.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

**Service Via Electronic Mail:**

Derek E. Kline  
Blackfeet Legal Department  
P.O. Box 849  
Browning, MT 59417  
(603) 707-1721  
derekekline@gmail.com  
tgilham@blackfeetnation.com

**Service Via USPS Mail:**

Wendy S. Kennedy  
James Kennedy  
356 Meriwether  
Cut Bank, MT 59427-9112  
james.rk.9040@gmail.com  
(406) 338-7932  
(406) 450-1023 (cell)

Rebecca M. Ross  
U.S. Department of Justice  
Indian Resources Section, ENRD  
P.O. Box 7611, Ben Franklin Station  
Washington, DC 20044  
(202) 616-3148  
rebecca.ross@usdoj.gov  
IRSMontanaWater.enrd@usdoj.gov

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
CUT BANK CREEK  
BASIN 41L**

**Water Right Number:** 41L 203003-00 STATEMENT OF CLAIM

**Version:** 2 -- POST DECREE

**Status:** ACTIVE

**Owners:** JAMES R KENNEDY  
356 MERIWETHER  
CUT BANK, MT 59427-9112

WENDY S KENNEDY  
356 MERIWETHER  
CUT BANK, MT 59427-9112

**Priority Date:** DECEMBER 12, 1918

**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 STOCK WATERING 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:** WILLOW 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		S2SENESE	34	34N	9W	GLACIER

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

2		SWSWNWSW	35	34N	9W	GLACIER
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**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

**Period of Use:** JANUARY 1 TO DECEMBER 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			S2SENESE	34	34N	9W	GLACIER
2			SWSWNWSW	35	34N	9W	GLACIER

**Remarks:**

THIS WATER RIGHT IS LOCATED, IN WHOLE OR IN PART, WITHIN THE BOUNDARY OF THE BLACKFEET INDIAN RESERVATION.