

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

CLAIMANT: USA (Department of Agriculture Forest
Service)

CASE 41K-0217-R-2023
41K 56591-00

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

All water right claims that appeared in the Preliminary Decree for Sun River (Basin 41K) were subject to “issue remarks” resulting from pre-decree examination by the DNRC, objections, and counterobjections. The above-captioned claim received an

issue remark during the DNRC’s review of the claims.

Claim 41K 56591-00 was consolidated into Case 41K-0217-R-2023 and an Order Setting Filing Deadline was issued by the Court to resolve the issue remark.

FINDINGS OF FACT

1. Claim 41K 56591-00 received the following substantive issue remark:

AN AMENDMENT WAS SUBMITTED ON 08/13/2020 REQUESTING TO AMEND THE PURPOSE AND FLOW RATE. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

2. On April 26, 2023, Claimant United States Department of Agriculture, Forest service (“Forest Service”) filed a *Response* which reiterated that the previously filed amendment resolved the issue remark and brought the claim into historical conformity. The *Response* states that correction to the flow rate is necessary to correct a decimal error in the original filing. Additionally, the *Response* states that the original filing is for a recreational cabin, necessitating a change in purpose from commercial to domestic. The *Response* included attachments of the amendment requesting the following modifications to the claim:

- 1. **Purpose (use):** Domestic
 - a. If irrigation, method of irrigation use Sprinkler Flood Water spreading Subirrigation Natural Overflow

- 8. **Flow Rate Claimed:** 5.0 cubic feet per second gallons per minute miner’s inches

3. On June 26, 2023, the Court set a filing deadline for the Forest Service to identify the number of households associated with claim 41K 56591-00 based on the previous request to modify the purpose to “domestic.” That deadline was subsequently extended in an Order issued on August 2, 2023.

4. On August 30, 2023, the Forest Service filed a second *Response*. In its second *Response*, the Forest Service states that based on its review of aerial imagery, there are two recreational cabins on the place of use. Based on this information, the

Forest Service requests two households be added to the claim. Additionally, the Forest Service states that it identified an error in its August 13, 2020 *Motion to Amend*. The Forest Service goes on to state that the original *Motion to Amend* correctly requests the flow rate be modified to 5 gallons per minute to account for the above-mentioned decimal error in the original filing, however, the Forest Service did not request modification to the volume to account for the proposed change in purpose for claim 41K 56591-00. The Forest Service requests modification of the volume to 1.5 acre-feet.

5. On October 31, 2023, the Court issued an Order Setting Filing Deadline for the Forest Service to file information or evidence substantiating the proposed increase to the volume element for claim 41K 56591-00.

6. On December 18, 2023, the Forest Service filed a third *Response* which states that the United States withdraws its Motion to Amend the volume and does not object to the volume appearing as it currently does on the abstract.

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. 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.

CONCLUSIONS OF LAW

1. The proposed modification contained in the Forest Service’s *Response* and previously filed *Motion to Amend* resolve the issue remark appearing on the claim. Based on the information contained in the Forest Service’s *Response*, along with the information contained in the attached *Motion to Amend*, the flow rate and purpose of

claim 41K 56591-00 should be modified as described in Finding of Fact No. 2. Based on the Forest Service's second *Response*, two households should be added to the claim. Finally, based on the Forest Service's third *Response*, the volume element should remain as currently listed on the abstract. The modifications resolve the issue remark, and the issue remark should be removed from the claim.

2. The requested amendment and modifications do not have the reasonable potential to adversely affect other water rights as they are corrections to the abstracts which do not make any change to the actual historical use of the claimed right on the ground. Notice by publication of this amendment is not required.

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.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service Via Electronic Mail:

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

Water Right Number: 41K 56591-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: USA (DEPT OF AGRICULTURE FOREST SERVICE)
WATER RIGHTS PROGRAM MANAGER, NORTHERN REGION
26 FORT MISSOULA RD
MISSOULA, MT 59804-7203

Priority Date: JULY 22, 1935

Type of Historical Right: USE

Purpose (Use): DOMESTIC

Flow Rate: 5.00 GPM

Volume: 0.36 AC-FT

Households: 2

Source Name: STRAIGHT 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		NENW	16	20N	10W	LEWIS AND CLARK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: OTHER DIVERSION

THE MEANS OF DIVERSION IS A LOW CAPACITY PUMP OR BUCKET.

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			NENW	16	20N	10W	LEWIS AND CLARK

THE TOWNSHIP IS UNSURVEYED. THE LEGAL LAND DESCRIPTION FOR THE PLACE OF USE HAS BEEN ESTIMATED.