

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

CLAIMANTS: James P. Troy; M. Maitland Troy

OBJECTOR: United States of America (USDA Forest Service)

CASE 41K-0301-R-2023
41K 96598-00

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, conclusion 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. Claim 41K 96598-00 received an objection to the place of use and maximum acres elements from the United States Forest Service as well as issue remarks during the DNRC's review of the claims. The claim was consolidated into Case 41K-0301-R-2023 to resolve the objection and issue remarks.

FINDINGS OF FACT

1. Claim 41K 96598-00 received the following substantive issue remark:
THE POINT OF DIVERSION APPEARS TO BE INCORRECT. THE POINT OF DIVERSION APPEARS TO BE IN THE SENWSW SEC 17 TWP 20N RGE 6W LEWIS AND CLARK COUNTY.
2. A Status Conference for Case 41K-0301-R-2023 took place on December 6, 2023, by telephone conference call. Water Master Eugene C. White presided; claimants M. Maitland Troy and James P. Troy were not in attendance and Mark Widerschein was present on behalf of objector United States Forest Service. During the conference, the Court intended to discuss the objections and issue remarks appearing on claim 41K 96598-00. Mr. Widerschein requested a 60-day filing deadline to file settlement documents.
3. On December 13, 2023, the Forest Service filed a *Notice of Withdrawal of Objection* for claim 41K 96598-00.
4. On February 9, 2024, the Water Court issued an Order Setting Filing Deadline for the Claimants to file information or evidence if they did not agree to the proposed modification to the point of diversion for claim 41K 96598-00. Nothing was filed at the ordered deadline by the Claimants. The Order Setting Filing Deadline included the following language regarding the above-listed issue remarks:

ORDERED that the Claimants review this order and, *if necessary*, file information or evidence stating why the point of diversion for claim 41K 96598-00 should not be modified as proposed in the issue remark above by **Wednesday, March 20, 2024**. *If nothing is filed by the deadline, this Water Master will conclude that the Claimants agree to the proposed modification of the point of diversion for claim 41K 96598-00, the point of diversion will be modified from the NWSW of Sec 17, Twp 20N, Rge 6W in Lewis and Clark County to the SENESW of Sec 17, Twp 20N, Rge 6W in Lewis and Clark County, and the issue remark will be removed from the claim.*

5. Claim 41K 96598-00 also received a notice type issue remark from the DNRC denoting modifications made during its reexamination of claims.

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.

CONCLUSIONS OF LAW

1. Based on the Forest Service’s *Withdrawal of Objection* for claim 41K 96598-00, the objection should be considered resolved.

2. The information in the record resolves the point of diversion issue remark appearing on claim 41K 96598-00. Because nothing was filed at the filing deadline by the Claimants, a preponderance of the evidence shows that the point of diversion of claim 41K 96598-00 should be modified from the NWSW of Sec 17, Twp 20N, Rge 6W in Lewis and Clark County to the SENESW of Sec 17, Twp 20N, Rge 6W in Lewis and Clark County, and the issue remark should be removed from the claim.

3. The notice-type issue remark appearing on claim 41K 96598-00 served its notice purpose and should be removed from the claim.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Water Master recommends that the Court modify the point of diversion of claim 41K 96598-00 as described in Conclusion of Law No. 2 and remove the issue remarks from the claim.

A post decree abstract of the water right claim reflecting the recommended changes is attached to this Report.

ELECTRONICALLY SIGNED AND DATED BELOW.

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

Water Right Number: 41K 96598-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: JAMES P TROY
PO BOX 241
AUGUSTA, MT 59410-0241

M MAITLAND TROY
PO BOX 177
AUGUSTA, MT 59410

Priority Date: OCTOBER 13, 1950

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 1.39 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: 36.80

Source Name: WASTE & SEEPAGE, UNNAMED TRIBUTARY OF ELK CREEK

Source Type: SURFACE WATER

ALSO KNOWN AS SUN RIVER, SOUTH FORK.

THE SOURCE IS WATER COLLECTED IN A DRAIN DITCH.

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		SENE SW	17	20N	6W	LEWIS AND CLARK

Period of Diversion: MARCH 1 TO DECEMBER 1

Diversion Means: HEADGATE

Ditch Name: EBERL DITCH

Period of Use: MARCH 1 TO DECEMBER 1

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	36.80		NENW	17	20N	6W	LEWIS AND CLARK

Total: 36.80