

Montana Water Court  
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**FILED**  
10/03/2024  
Sara Calkins  
CLERK  
Montana Water Court  
STATE OF MONTANA  
By: D'Ann CIGLER  
41E-0130-R-2024  
Lambert, Kathryn  
8.00

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
BOULDER RIVER—TRIBUTARY OF THE JEFFERSON RIVER (BASIN 41E)  
PRELIMINARY DECREE

\*\*\*\*\*

CLAIMANTS: Bryan E. Costigan; Twila A. Costigan; Gordon E. Giulio;  
David J. Schell; Sugarloaf Mountain LLC; Barbara A.  
Sutherlin

**CASE 41E-0130-R-2024**  
41E 89285-00

OBJECTOR: United States of America (Bureau of Reclamation)

**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 to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail 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**

The United States of America (USDI Bureau of Reclamation) objected to this claim. The Preliminary Decree includes the following issue remark:

EXISTENCE OF THE CLAIMED RESERVOIR CANNOT BE CONFIRMED WITH AVAILABLE DATA.

Claimants Gordon E. Giulio, David J. Schell, and Sugarloaf Mountain LLC did not appear at the January 25, 2024 scheduling conference and their defaults were entered in the January 26, 2024 Court Minutes, Order Entering Defaults, and Order Setting Filing Deadline. On August 2, 2024 the United States' Notice Of Stipulation And Motion For Show Cause Order was filed. The Stipulation To Resolve Objections is signed by the United States of America (USDI Bureau of Reclamation), Bryan E. Costigan, and Twila A. Costigan. On August 19, 2024, while this Master was on leave, another master issued an Order Setting Show Cause Filing Deadline which states:

ORDERED that the deadline is **September 18, 2024** for Gordon E. Giulio, David J. Schell, Sugarloaf Mountain LLC, and Barbara A. Sutherlin to show cause in writing why the Court should not change claim 41E 89285-00 as stated in the Stipulation to Resolve Objections. If nothing is filed by Gordon E. Giulio, David J. Schell, Sugarloaf Mountain LLC, and Barbara A. Sutherlin, the Court will conclude they agree with the changes stated in the Stipulation to Resolve Objections.

Nothing was filed. These documents are viewable in the Court's FullCourt Enterprise case management system.

#### APPLICABLE LAW

"All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section." Section 85-2-248(2), MCA.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 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 including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

#### FINDINGS OF FACT

1. The Preliminary Decree states that there is no reservoir in the S2SENE section 36, T7N, R5W, JEFFERSON. The reservoir record should be removed. The issue remark concerning the existence of the reservoir should be removed as addressed and resolved.

2. The Preliminary Decree states that the volume is 260.27 AC-FT. As the reservoir has been removed, the volume quantification should be removed and replaced with the following

standard remark for mining claims without a reservoir: THIS RIGHT IS LIMITED TO THE VOLUME OF WATER HISTORICALLY USED FOR MINING PURPOSES.

3. The Preliminary Decree also includes the following notice remark:

WHEN THIS CLAIM WAS ORIGINALLY DECREED, THE PERIOD OF DIVERSION WAS NOT INCLUDED AS AN ELEMENT OF THE CLAIM. IN 2008, THE PERIOD OF DIVERSION ELEMENT WAS ADDED TO ALL CLAIM ABSTRACTS. IT IS NOT CERTAIN IF THE PERIOD OF DIVERSION DATES ADDED TO THIS CLAIM ACCURATELY REFLECT THE HISTORICAL PERIOD OF DIVERSION. MORE INFORMATION IS REQUIRED.

The remark provides notice of this change made prior to issuance of the Preliminary Decree and does not raise an unresolved issue which needs to be addressed. The remark should be removed as having served its notice purpose.

#### CONCLUSION OF LAW

The Stipulation filed by some of the parties and Order Setting Show Cause Filing Deadline are sufficient to contradict and overcome the prima facie claim, and to resolve the issue remark without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

#### RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

**ELECTRONICALLY SIGNED AND DATED BELOW**

**Service via USPS Mail:**

Bryan E. Costigan  
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Gordon E. Giulio  
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David J. Schell  
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Sugarloaf Mountain LLC  
1821 South Ave W Ste 407  
Missoula, MT 59801

Barbara A. Sutherlin  
PO Box 525  
Boulder, MT 59632

**Service Via Electronic Mail:**

Jennifer A. Najjar  
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PO Box 7611  
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**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**BOULDER RIVER, TRIBUTARY TO JEFFERSON RIVER**  
**BASIN 41E**

**Water Right Number:** 41E 89285-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:**

BRYAN E COSTIGAN  
1621 MISSOULA AVE  
HELENA, MT 59601-3965

TWILA A COSTIGAN  
1621 MISSOULA AVE  
HELENA, MT 59601-3965

GORDON E GIULIO  
PO BOX 206  
BOULDER, MT 59632-0206

DAVID J SCHELL  
PO BOX 341  
BOULDER, MT 59632-0341

BARBARA A SUTHERLIN  
PO BOX 525  
BOULDER, MT 59632-0525

SUGARLOAF MOUNTAIN LLC  
1821 SOUTH AVE W STE 407  
MISSOULA, MT 59801-6521

**Priority Date:** AUGUST 3, 1912

**Type of Historical Right:** FILED

**Purpose (Use):** MINING

**Flow Rate:** 1.25 CFS

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

**Source Name:** HIGH ORE CREEK

**Source Type:** SURFACE WATER

ALSO KNOWN AS SECONDBUSH CREEK

**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         |                 | SWSWSE         | 36         | 7N         | 5W         | JEFFERSON     |

**\*Period of Diversion:** APRIL 1 TO NOVEMBER 1

**Diversion Means:** PUMP

|   |  |        |    |    |    |           |
|---|--|--------|----|----|----|-----------|
| 2 |  | NENESE | 36 | 7N | 5W | JEFFERSON |
|---|--|--------|----|----|----|-----------|

**\*Period of Diversion:** APRIL 1 TO NOVEMBER 1

**Diversion Means:** PUMP  
 3 SESESE 15 6N 5W JEFFERSON  
**\*Period of Diversion:** APRIL 1 TO NOVEMBER 1  
**Diversion Means:** PUMP  
 4 NENENE 22 6N 5W JEFFERSON  
**\*Period of Diversion:** APRIL 1 TO NOVEMBER 1  
**Diversion Means:** PUMP  
 5 SWNWNW 23 6N 5W JEFFERSON  
**\*Period of Diversion:** APRIL 1 TO NOVEMBER 1  
**Diversion Means:** PUMP  
 6 NESENW 23 6N 5W JEFFERSON  
**\*Period of Diversion:** APRIL 1 TO NOVEMBER 1  
**Diversion Means:** PUMP

THE BOULDER RIVER AS A NATURAL CARRIER FOR HIGH ORE CREEK WATER.

**Period of Use:** APRIL 1 TO NOVEMBER 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         |              |                 | NENESE         | 36         | 7N         | 5W         | JEFFERSON     |
| 2         |              |                 | SWSWSE         | 36         | 7N         | 5W         | JEFFERSON     |
| 3         |              |                 | SESESE         | 15         | 6N         | 5W         | JEFFERSON     |
| 4         |              |                 | NENENE         | 22         | 6N         | 5W         | JEFFERSON     |
| 5         |              |                 | SWNWNW         | 23         | 6N         | 5W         | JEFFERSON     |
| 6         |              |                 | NESENW         | 23         | 6N         | 5W         | JEFFERSON     |