

Montana Water Court  
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**IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
MISSOURI RIVER ABOVE HOLTER DAM BASIN (41I)  
PRELIMINARY DECREE**

\* \* \* \* \*

CLAIMANT: BNSF Railway Co.

OBJECTOR: BNSF Railway Co.

**CASE 41I-0076-R-2023**

- 41I 142529-00
- 41I 142637-00
- 41I 142646-00
- 41I 142664-00
- 41I 142665-00
- 41I 142666-00
- 41I 142667-00
- 41I 142670-00

**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**

The above-captioned claims appeared in the Preliminary Decree for the Missouri River above Holter Dam (Basin 41I) issued on June 24, 2022. The claims are owned by BNSF Railway Co. (BNSF). BNSF self-objected to claims 41I 142529-00, 41I 142637-00, 41I 142664-00, and 41I 142665-00. All of the claims received issue remarks. Issue remarks are notations identifying potential legal or factual issues with water rights and the Water Court is required to resolve these potential issues.

FINDINGS OF FACT

**Withdrawals of Statement of Claim**

1. On October 15, 2024, Claimant filed withdrawals of statement of claims for claims 41I 142637-00, 41I 142646-00, 41I 142664-00, 41I 142665-00, 41I 142666-00, and 41I 142667-00.

**41I 142529-00**

2. Claim 41I 142529-00 appeared in the Basin 41I Preliminary Decree as a claim for commercial use of a well in the SENESW of Section 23, T5N, R2E, Broadwater County.

3. The place of use was decreed as the Toston Original Townsite in the SWNESW of Section 23, T5N, R2E, Broadwater County. The claim received the following issue remarks:

AN AMENDMENT WAS SUBMITTED ON 01/10/2022 REQUESTING TO AMEND THE PLACE OF USE .  
AS THIS IS A DECREED BASIN, THE AMENDMENT HAS NOT BEEN IMPLEMENTED.

4. BNSF self-objected to the claim based on the place of use amendment. The January 10, 2022 amendment sought to correct both the point of diversion and place of use for claim 41I 142529-00.

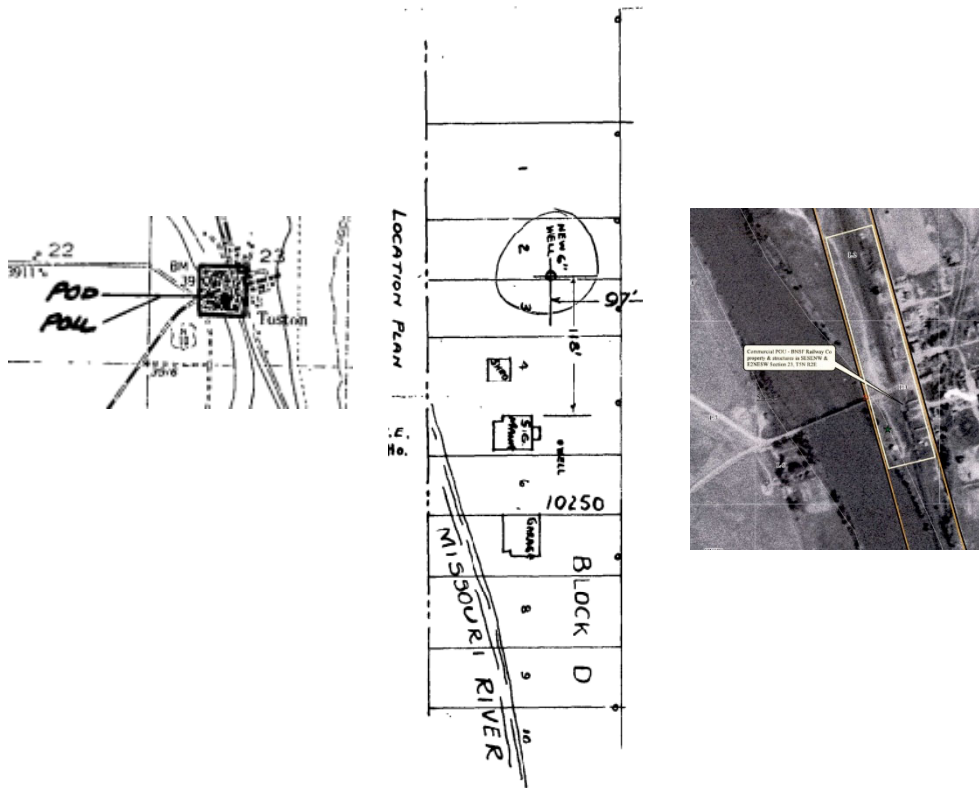
5. The DNRC corrected the point of diversion as requested by the amendment, but they did not correct the place of use.

6. The Statement of Claim originally listed the place of use as the NESW of Section 23, T5N, R2E. The place of use was later refined to the SWNESW of Section 23, T5N, R2E by the DNRC.

7. The amendment requests modifying the place of use as follows:

7. **Place of Use:** County - Broadwater  See attachment  
     acres      Lot      Block SE ¼ SE ¼ NW ¼ Section 23 T 5N R 2E  
     acres      Lot      Block E2 ¼ NE ¼ SW ¼ Section 23 T 5N R 2E

8. The maps attached to the Statement of Claim are consistent with the map provided in support of the requested change to the place of use.



**41I 142670-00**

9. Claim 41I 142670-00 appeared in the Basin 41I Preliminary Decree as a claim for commercial use of water from a well in the SWNENE of Section 23, T10N, R4W, Lewis and Clark County.

10. The claim received the following issue remark:

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE AND CANNOT BE CONFIRMED DUE TO LACK OF DATA.

VOLUME MAY BE EXCESSIVE. BASED ON THE FLOW RATE AND PERIOD OF USE, THE SYSTEM WOULD HAVE TO RUN 19.2 HOURS PER DAY TO DELIVER THE CLAIMED VOLUME. NO INFORMATION EXISTS IN THE CLAIM FILE TO CONFIRM THIS FIGURE.

12. Claim 41I 142670-00 was decreed with a volume of 260.00 acre-feet and a flow rate of 200.00 gallons per minute.

13. No evidence in the claim file, other than the issue remarks, shows the claimed volume is historically inaccurate.

**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.

6. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

7. When resolving issue remarks, the 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. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

8. If a claimant agrees to reduce or limit a claim, the Water Court may accept the reduction or limitation without reviewing further evidence, unless an unresolved issue remark remains. Rule 17(c), W.R.Adj.R.

## CONCLUSIONS OF LAW

### **Withdrawals of Statement of Claim**

1. Claimant’s withdrawal of claims 41I 142637-00, 41I 142646-00, 41I 142664-00, 41I 142665-00, 41I 142666-00, and 41I 142667-00 resolves the objections and issue remarks on the claims.

### **41I 142529-00**

2. Claimant showed by a preponderance of the evidence that the place of use for claim 41I 142529-00 should be modified to:

7. Place of Use: County - Broadwater  See attachment  
 \_\_\_ acres \_\_\_ Lot \_\_\_ Block SE ¼ SE ¼ NW ¼ Section 23 T 5N R 2E  
 \_\_\_ acres \_\_\_ Lot \_\_\_ Block E2 ¼ NE ¼ SW ¼ Section 23 T 5N R 2E

**41I 142670-00**

3. The volume issue remarks do not overcome the prima facie status of claim 41I 142670-00.

**RECOMMENDATIONS**

1. Claims 41I 142637-00, 41I 142646-00, 41I 142664-00, 41I 142665-00, 41I 142666-00, and 41I 142667-00 should be dismissed.

2. The place of use for claim 41I 142529-00 should be modified to:

7. Place of Use: County - Broadwater  See attachment  
 \_\_\_ acres \_\_\_ Lot \_\_\_ Block SE ¼ SE ¼ NW ¼ Section 23 T 5N R 2E  
 \_\_\_ acres \_\_\_ Lot \_\_\_ Block E2 ¼ NE ¼ SW ¼ Section 23 T 5N R 2E

3. The issue remarks should be removed from claims 41I 142529-00 and 41I 142670-00.

A post decree abstract of each water right claim reflecting these recommendations 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  
MISSOURI RIVER, ABOVE HOLTER DAM  
BASIN 41I**

**Water Right Number:** 411 142529-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**Owners:** BNSF RAILWAY CO  
2650 LOU MENK DR # MOB-2  
FORT WORTH, TX 76131-2830

**Priority Date:** SEPTEMBER 24, 1959

**Type of Historical Right:** FILED

**Purpose (Use):** COMMERCIAL

**Purpose Clarification:** RAILROAD STATION

**Flow Rate:** 30.00 GPM

**Volume:** 0.30 AC-FT

**Source Name:** GROUNDWATER

**Source Type:** GROUNDWATER

**\*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		SESW	23	5N	2E	BROADWATER

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

**Diversion Means:** WELL

**Subdivision:** TOSTON ORIGINAL TOWNSITE TRACT/LOT: 2 BLOCK: D

**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			SESW	23	5N	2E	BROADWATER

**Subdivision:** TOSTON ORIGINAL TOWNSITE

2			E2NESW	23	5N	2E	BROADWATER
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**Subdivision:** TOSTON ORIGINAL TOWNSITE

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**MISSOURI RIVER, ABOVE HOLTER DAM**  
**BASIN 41I**

**Water Right Number:** 411 142637-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** **DISMISSED**

**Owners:** BNSF RAILWAY CO  
2650 LOU MENK DR # MOB-2  
FORT WORTH, TX 76131-2830

**Priority Date:**

**Type of Historical Right:**

**Purpose (Use):** COMMERCIAL

**Flow Rate:**

**Volume:**

**Source Name:** SPRING, UNNAMED TRIBUTARY OF PRICKLY PEAR CREEK

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

**Period of Use:**

**Place of Use:**

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**Remarks:**

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
MISSOURI RIVER, ABOVE HOLTER DAM  
BASIN 41I**

**Water Right Number:** 411 142646-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** **DISMISSED**

**Owners:** BNSF RAILWAY CO  
2650 LOU MENK DR # MOB-2  
FORT WORTH, TX 76131-2830

**Priority Date:**

**Type of Historical Right:**

**Purpose (Use):** COMMERCIAL

**Flow Rate:**

**Volume:**

**Source Name:** GROUNDWATER

**Source Type:** GROUNDWATER

**Point of Diversion and Means of Diversion:**

**Period of Use:**

**Place of Use:**

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**Remarks:**

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.



**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
MISSOURI RIVER, ABOVE HOLTER DAM  
BASIN 41I**

**Water Right Number:** 411 142664-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** **DISMISSED**

**Owners:** BNSF RAILWAY CO  
2650 LOU MENK DR # MOB-2  
FORT WORTH, TX 76131-2830

**Priority Date:**

**Type of Historical Right:**

**Purpose (Use):** COMMERCIAL

**Flow Rate:**

**Volume:**

**Source Name:** GREENHORN CREEK

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

**Period of Use:**

**Place of Use:**

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**Remarks:**

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
MISSOURI RIVER, ABOVE HOLTER DAM  
BASIN 41I**

**Water Right Number:** 411 142665-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** **DISMISSED**

**Owners:** BNSF RAILWAY CO  
2650 LOU MENK DR # MOB-2  
FORT WORTH, TX 76131-2830

**Priority Date:**

**Type of Historical Right:**

**Purpose (Use):** COMMERCIAL

**Flow Rate:**

**Volume:**

**Source Name:** GREENHORN CREEK

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

**Period of Use:**

**Place of Use:**

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**Remarks:**

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
MISSOURI RIVER, ABOVE HOLTER DAM  
BASIN 41I**

**Water Right Number:** 411 142666-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** **DISMISSED**

**Owners:** BNSF RAILWAY CO  
2650 LOU MENK DR # MOB-2  
FORT WORTH, TX 76131-2830

**Priority Date:**

**Type of Historical Right:**

**Purpose (Use):** COMMERCIAL

**Flow Rate:**

**Volume:**

**Source Name:** GREENHORN CREEK

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

**Period of Use:**

**Place of Use:**

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**Remarks:**

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
MISSOURI RIVER, ABOVE HOLTER DAM  
BASIN 41I**

**Water Right Number:** 411 142667-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** **DISMISSED**

**Owners:** BNSF RAILWAY CO  
2650 LOU MENK DR # MOB-2  
FORT WORTH, TX 76131-2830

**\*Priority Date:**

**Type of Historical Right:**

**Purpose (Use):** COMMERCIAL

**Flow Rate:**

**Volume:**

**Source Name:** UNNAMED TRIBUTARY OF GREENHORN CREEK

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

**Period of Use:**

**Place of Use:**

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**Remarks:**

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
MISSOURI RIVER, ABOVE HOLTER DAM  
BASIN 41I**

**Water Right Number:** 411 142670-00 STATEMENT OF CLAIM  
**Version:** 4 -- POST DECREE  
**Status:** ACTIVE

**Owners:** BNSF RAILWAY CO  
2650 LOU MENK DR # MOB-2  
FORT WORTH, TX 76131-2830

**Priority Date:** DECEMBER 31, 1907

**Type of Historical Right:** FILED

**Purpose (Use):** COMMERCIAL

**Purpose Clarification:** RAILROAD PURPOSES

**Flow Rate:** 200.00 GPM

**Volume:** 260.00 AC-FT

**Source Name:** GROUNDWATER

**Source Type:** GROUNDWATER

**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		SWNE	23	10N	4W	LEWIS AND CLARK

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

**Diversion Means:** WELL

**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			NENE	23	10N	4W	LEWIS AND CLARK

**Remarks:**

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

4702-00	66070-00	85586-00	89304-00	89306-00	89307-00
89308-00	89309-00	142670-00			

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE ASSOCIATED WHICH MEANS THE RIGHTS SHARE THE SAME POINT OF DIVERSION.

4702-00	85586-00	142670-00
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THIS WATER RIGHT IS ASSOCIATED WITH WATER RIGHT NO. 411 P4702-00 AND 411 P85586-00. THEY SHARE A COMMON POINT OF DIVERSION, SEE 411 142670-00.