

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**

CLAIMANTS: Elkhorn Tunnels LLC; Montana Tunnels Mining
Inc.; US Minerals Exploration Co.

CASE 41I-0113-R-2024
41I 38508-00

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

Claim 41I 38508-00 appeared in the Preliminary Decree for the Missouri River above Holter Dam (Basin 41I) issued on June 24, 2022. The claim is owned by Elkhorn Tunnels LLC, Montana Tunnels Mining Inc., and U.S. Minerals Exploration Co. The claim 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

Flow Rate Issue Remarks

1. Claim 41I 38508-00 was decreed as a claim for flood irrigation from Spring Creek (also known as Homestake Creek). The claim was decreed with a flow rate of 130.15 gallons per minute (GPM).

2. The claim received the following flow rate issue remarks:

THE CLAIMED FLOW RATE EXCEEDS THE 10 MINERS INCHES OF HOMESTAKE CREEK DECREED IN CASE NO. 668 , LEWIS AND CLARK COUNTY.

THE LOW FLOW RATE TO ACRES RATIO FOR THIS CLAIM, 2.02 GPM/ACRE, MAY INDICATE AN EXPANSION OF THE HISTORICAL RIGHT.

THE CLAIMED FLOW RATE EXCEEDS THE 10 MINERS INCHES OF HOMESTAKE CREEK DECREED IN CASE NO. 668 , LEWIS AND CLARK COUNTY.

3. Claim 41I 38508-00 is based on a decreed right for 10.00 miner's inches (112.20 GPM).

4. The Court ordered Claimants to file evidence supporting the historical use of 130.15 GPM. Nothing was filed by the deadline. Therefore, the Court ordered Claimants to show cause why the flow rate should not be reduced to 112.20 GPM to match the decreed flow rate. The order stated that if nothing was filed by the deadline, the flow rate would be reduced to 112.20 GPM. Nothing was filed by the deadline.

Point of Diversion Issue Remark

5. Claim 41I 38508-00 was decreed with two points of diversion as follows:

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		S	W	S	W	9	7N 4W JEFFERSON
Period of Diversion: MAY 15 TO SEPTEMBER 15							
Diversion Means: HEADGATE							
Ditch Name: FREYLER DITCH							
2		S	E	S	W	9	7N 4W JEFFERSON
Period of Diversion: MAY 15 TO SEPTEMBER 15							
Diversion Means: HEADGATE							
Ditch Name: FREYLER DITCH							
Period of Use: MAY 15 TO SEPTEMBER 15							

6. The claim received the following point of diversion issue remark:

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE HEADGATE CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

7. When examining the points of diversion for claim 41I 38508-00, the DNRC claim examiner made the following notes:

Added P49. The problem with establishing these PODs is that the WRS photo appears to show what might be its location but in the 1979 aerial, I am unable to determine anything. More recent aerials appear to have a retention pond or some sort of water holding over the area from the mining and even the stream is no longer visible. Unable to confirm any HG in the area historically although from what I can surmise, these legals were potentially correct. 1/29/2020 emm

8. A change authorization was processed in the 1980s for claim 41I 38508-00, modifying it from a flood irrigation claim to a mining claim. This change explains why recent aerial photographs do not match the historical use of the claim. Based on the information from the claim examiner, the historical locations of the headgates were accurately claimed.

Place of Use Issue Remarks

9. Claim 41I 38508-00 was decree with the following 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>
5.00		SESWSW	9	7N	4W	JEFFERSON
3.00		SWSWNE	16	7N	4W	JEFFERSON
30.00		NENW	16	7N	4W	JEFFERSON
15.00		N2NWNW	16	7N	4W	JEFFERSON
12.00		E2SENE	16	7N	4W	JEFFERSON
<u>65.00</u>						

10. The claim received the following place of use issue remarks:

THE JEFFERSON COUNTY WATER RESOURCES SURVEY (1956) APPEARS TO INDICATE 42.00 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.
USDA AERIAL PHOTOGRAPH NO(S). 379-148 , DATED 08/29/1979 , APPEARS TO INDICATE 50.75 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

11. The DNRC claim examiner verified acreage in the 1956 Water Resources Survey and the 1979 aerial photograph as follows:

comments: -----
 data source # 1: USDA AERIAL PHOTOGRAPH 279.40 date: 8-29-79

 ACRES LQT BLK QTR SEC SEC TWP RGE CNTY
 001 22.25 NENW 16 07N 04W JE
 002 11.25 E2SENW 16 07N 04W JE
 003 7.00 N2NWNW 16 07N 04W JE
 004 2.50 SWSWNE 16 07N 04W JE

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28/89 DNRC EXAMINATION WORKSHEET CONT. 41I -W-038508-00
 005 6.75 SESWSW 09 07N 04W JE
 Total 50.75
 See attached examination worksheet p.o.u. addendum
 comments -----
 data source # 2: JEFFERSON CO. M.A.S. date: 1956

 ACRES LQT BLK QTR SEC SEC TWP RGE CNTY
 001 10.00 NENW 16 07N 04W JE
 002 0.00 E2SENW 16 07N 04W JE
 003 30.00 N2NWNW 16 07N 04W JE
 004 0.00 SWSWNE 16 07N 04W JE
 005 2.00 SESWSW 09 07N 04W JE
 Total 42.00
 See attached examination worksheet p.o.u. addendum
 comments -----

12. The Court ordered Claimant to file evidence supporting the historical irrigation of the 65.00-acre place of use. Nothing was filed by the deadline. Therefore, the Court ordered Claimants to show cause why the place of use should not be modified to match the acreage verified by the 1956 Water Resources Survey. The order stated that if nothing was filed by the deadline, the place of use and maximum acres would be reduced to 42.00 acres. Nothing was filed by the deadline.

13. Claim 41I 38508-00 also received the following place of use issue remark:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT WERE FILED BY DIFFERENT PARTIES WHO CLAIM OVERLAPPING PLACES OF USE. 41I 38508-00 & 41I 121041-00.

14. Claim 41I 38508-00 and 41I 121041-00 are identified as associated water rights that share a place of use. This overlapping place of use issue remark does not overcome the prima facie status of the claim and will be removed from the claim abstract.

Ownership Issue Remark

15. Finally, claim 41I 38508-00 received the following ownership issue remark:

AS OF 12/10/2021, THIS WATER RIGHT APPEARS TO BE OWNED BY MONTANA TUNNELS MINING INC., PO BOX 176, JEFFERSON CITY, MT, 59638-0176.

16. Montana Tunnels Mining Inc. appears as an owner on claim 41I 38508-00. Ownership may be further modified at any time with the DNRC.

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 fails to comply with an order issued by the Water Court, the Court may issue orders of sanction that are just. Rule 22, W.R.Adj.R.

9. Sanctions applied against a claimant may include modification of a claim to conform with data provided by the DNRC, information obtained by the Court, or information included in an objection, or the entry of default and termination of a water right claim. Rule 11, W.R.Adj.R.

CONCLUSIONS OF LAW

Flow Rate Issue Remarks

1. The flow rate issue remarks overcome the prima facie status of the claim. The evidence in the claim file shows the decreed flow rate is 10.00 miner’s inches (112.20 GPM).

Point of Diversion Issue Remark

2. The point of diversion issue remark does not overcome the prima facie status of the claim. The information provided by the claim examiner explains that the historical locations of the points of diversion were correctly claimed.

Place of Use Issue Remarks

3. The acres irrigated issue remark overcomes the prima facie status of the claim. The evidence in the claim file shows the historical place of use in 42.00 acres as follows:

<u>ID</u>	<u>Acres</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	10.00	NENW		16	7N	4W Jefferson
2	30.00	N2NWNW		16	7N	4W Jefferson
3	2.00	SESWSW		09	7N	4W Jefferson
Total:		42.00				

4. The overlapping place of use issue remark does not overcome the prima facie status of the claim. Claims 41I 38508-00 and 41I 121041-00 are associated rights that share a place of use.

Ownership Issue Remark

5. The ownership issue remark provided its intended notice.

RECOMMENDATIONS

1. The flow rate should be reduced to 112.20 GPM.
2. The place of use and maximum acres should be modified as follows:

<u>ID</u>	<u>Acres</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	10.00	NENW		16	7N	4W Jefferson
2	30.00	N2NWNW		16	7N	4W Jefferson
3	2.00	SESWSW		09	7N	4W Jefferson
Total:		42.00				

3. The issue remarks should be removed from claim 41I 38508-00.

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

ELECTRONICALLY SIGNED AND DATED BELOW.

SERVICE VIA USPS MAIL

Elkhorn Tunnels LLC
320 W Main St
Aspen, CO 81611-1614

Montana Tunnels Mining Inc
PO Box 176
Jefferson City, MT 59638-0176

US Minerals Exploration Co
~~141 Union Blvd Suite 100~~
~~Lakewood, CO 80215~~
(returned mail-undeliverable)

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

Water Right Number: 411 38508-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: ELKHORN TUNNELS LLC
320 W MAIN ST
ASPEN, CO 81611-1614

MONTANA TUNNELS MINING INC
PO BOX 176
JEFFERSON CITY, MT 59638-0176

US MINERALS EXPLORATION CO
141 UNION BLVD SUITE 100
LAKEWOOD, CO 80215

Priority Date: APRIL 1, 1872

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 112.20 GPM

***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: 42.00

Source Name: SPRING CREEK

Source Type: SURFACE WATER

ALSO KNOWN AS AS HOMESTAKE 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		SWSWSW	9	7N	4W	JEFFERSON

Period of Diversion: MAY 15 TO SEPTEMBER 15

Diversion Means: HEADGATE

Ditch Name: FREYLER DITCH

2		SESWSW	9	7N	4W	JEFFERSON
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Period of Diversion: MAY 15 TO SEPTEMBER 15

Diversion Means: HEADGATE

Ditch Name: FREYLER DITCH

Period of Use: MAY 15 TO SEPTEMBER 15

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	10.00		NENW	16	7N	4W	JEFFERSON
2	30.00		N2NWNW	16	7N	4W	JEFFERSON
3	2.00		SESWSW	9	7N	4W	JEFFERSON
Total:	42.00						

Remarks:

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

9-00	38508-00	59099-00	59100-00	59101-00	59235-00
59236-00	59237-00	68646-00	69113-00	70606-00	92802-00
96283-00	121039-00	121041-00			

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9-00	38508-00	59099-00	59100-00	59235-00	59236-00
59237-00	68646-00	69113-00	92802-00	96283-00	121039-00

DECREEED SOURCE - HOMESTAKE CREEK STIPULATION: ALSO THE RIGHT TO USE ALL OF THE WATERS OF HOMESTAKE CREEK DURING THE IRRIGATING SEASON OF EACH YEAR COMMENCING WITH JUNE 1ST, ABSOLUTELY WITHOUT REGARD TO DATES OF APPROPRIATION.