

Montana Water Court  
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IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
MADISON RIVER BASIN (41F)  
PRELIMINARY DECREE

\*\*\*\*\*

CLAIMANTS: Gary A. Croy; Kim Croy

**CASE 41F-0101-R-2024**

41F 30117950

41F 30117951

41F 30117952

**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**

### **Statement of the case**

The captioned stock claims appeared in the Preliminary Decree with the following issue remarks:

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 41F DECREE ISSUED 07/25/1984.

THE TYPE OF HISTORICAL RIGHT MAY BE QUESTIONABLE. DOCUMENTATION SUBMITTED WITH THE CLAIM INDICATES A USE RIGHT.

Issue remarks result from Department of Natural Resources and Conservation (“DNRC”) claims examination.

Montana law requires the Water Court to resolve issue remarks. Information in claim file 41F 30117952 resolved the issue remark questioning the type of historical right identified by claim 41F 30117952. Information before the court did not resolve the same issue remark on claims 41F 30117950 and 41F 30117951. Pursuant to § 85-2-248(3), MCA the court contacted claimants for evidence resolving the type of historical right issue remark on claims 41F 30117950 and 41F 30117951.

Kim Croy and Gary A. Croy (“Croys”), by and through their counsel of record, Benjamin S. Sudduth, filed evidence resolving the type of historical right issue remark on claims 41F 30117950 and 41F 30117951.

### **Issues**

1. What is the type of historical right for each claim?
2. Are the issue remarks on each claim resolved?

### **Findings of fact**

The type of historical right for stock claims 41F 30117950 and 41F 30117951 is “use.” The Preliminary Decree abstract for stock claim 41F 30117952 correctly identifies the type of historical right, “decreed.”

## Principles of law

1. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-222, MCA. Prima facie proof may be overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R. A preponderance of the evidence is a “modest standard” and is evidence that demonstrates the fact to be proved is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 348, 240 P.3d 628.

2. The Montana Water Court is permitted to use information submitted by the Department of Natural Resources and Conservation, the statement of claim, information from approved compacts, and any other data obtained by the Court to evaluate water right claims. Section 85-2-231(2), MCA.

3. When resolving issue remarks, the Montana 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.

4. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. Section 85-2-248(3), MCA.

5. Circumstantial evidence is often the only evidence available in a Water Court proceeding. “Circumstantial evidence” is that which tends to establish a fact by proving another and which, though true, does not of itself conclusively establish that fact but affords an inference or presumption of its existence.” Section 26-1-102(1), MCA.

While a single piece of circumstantial evidence such as a historical document may not be sufficient to overcome the proof established by a prima facie statement of claim, a historical document supplemented by additional circumstantial evidence may be enough to determine that the evidence as a whole demonstrates the fact to be proved is “more probable than not,” thereby meeting the burden of proof to overcome a prima facie statement of claim. See *Giese v. Teton Cooperative Canal Company*, Case 41O-435 at p. 4, (MT Water Court Order Amending and Adopting Master’s Report May 3, 2012).

## **Analysis**

### **Issues 1 and 2 – type of historical right and issue remark resolution**

Each set of attachments for the captioned statements of claim included an excerpt from Case No. 1236, *Marshall v. Elliot*, Fifth Judicial District, Madison County, (“Case No. 1236”), to support their historical basis. Case No. 1236 identifies North Meadow Creek as the decreed source. The only claim in this case with a source of North Meadow Creek is 41F 30117952, thereby supporting “decreed” as the type of historical right for the claim and resolving the issue remark questioning the type of historical right identified by claim 41F 30117952.

The sources claimed by statements of claim 41F 30117950 (Spring, Unnamed Tributary of North Meadow Creek) and 41F 30117951 (Slim Sam Creek) were not included in the North Meadow Creek district court decree, bringing into question the decree as support for “decreed” as the type of historical right.

Croys assert claims 41F 30117950 and 41F 30117951 should identify “use” as the type of historical right. Croys point to two documents in support of their assertion. First, specific language included in Case No. 1236 states North Meadow Creek water was used for irrigating “and for other useful and beneficial purposes.” *See* p. 2 and Ex. A of Response. Croys assert this language provides evidence that at the priority date claimed by claims 41F 30117950 and 41F 30117951 (the same priority date as claim 41F 30117952), “water rights in the North Meadow Creek area were being used for purposes other than irrigating, including livestock watering.” Second, a 1965 Madison County Water Resources Survey excerpt noting “the historical importance of livestock grazing in Madison County.” *See* p. 3 and Ex. B of Response. The Croys’ Response and Exhibits may be viewed on the court’s case management system, FullCourt Enterprise, at document sequence 3.00.

The claims appeared in the Preliminary Decree with the following issue remark:

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 41F DECREE ISSUED 07/25/1984.

Water users were given the opportunity to review the claims and file an objection. The deadline to file objections expired. No water users filed objections to the claims.

## Conclusions of law

The circumstantial evidence provided by Croys overcomes, by a preponderance of evidence, the prima facie proof afforded the type of historical right for claims 41F 30117950 and 41F 30117951. The type of historical right for claims 41F 30117950 and 41F 30117951 is “use.” The type of historical right issue remark on claim 41F 30117952 appears on the abstract in error. The documentation attached to and in support of prima facie statement of claim 41F 30117952 confirms the accuracy of the prima facie proof afforded the type of historical right identified by the statement of claim, “decreed.” The type of historical right issue remark on each claim is resolved.

The issue remark on each claim noting the lack of the claim’s inclusion in the previous Basin 41F decree served its notice purpose.

## Recommendations

Stock claims 41F 30117950 and 41F 30117951 should be modified as follows to accurately reflect historical use.

<b><u>TYPE OF HISTORICAL RIGHT:</u></b>	<del>DECREED</del>	USE
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The issue remarks should be removed from the claim abstracts.

Post Decree Abstracts of Water Right Claim accompany this report to confirm implementation of the recommendations in the state’s centralized water right record system.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

### **Service via Electronic Mail**

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**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
MADISON RIVER  
BASIN 41F**

**Water Right Number:** 41F 30117950 STATEMENT OF CLAIM

**Version:** 2 -- POST DECREE

**Status:** ACTIVE

**Owners:** GARY A CROY  
PO BOX 63  
ENNIS, MT 59729-0063

KIM CROY  
PO BOX 63  
ENNIS, MT 59729

**Priority Date:** MAY 10, 1888

**Type of Historical Right:** USE

**Purpose (Use):** STOCK

**\*Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

**\*Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCKWATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

**Source Name:** SPRING, UNNAMED TRIBUTARY OF NORTH MEADOW 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		NENWNE	24	4S	2W	MADISON

**Period of Diversion:** MAY 1 TO NOVEMBER 15

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

**Period of Use:** MAY 1 TO NOVEMBER 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			NENWNE	24	4S	2W	MADISON

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
MADISON RIVER  
BASIN 41F**

**Water Right Number:** 41F 30117951 STATEMENT OF CLAIM

**Version:** 2 -- POST DECREE

**Status:** ACTIVE

**Owners:** GARY A CROY  
PO BOX 63  
ENNIS, MT 59729-0063

KIM CROY  
PO BOX 63  
ENNIS, MT 59729

**Priority Date:** MAY 10, 1888

**Type of Historical Right:** USE

**Purpose (Use):** STOCK

**\*Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

**\*Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCKWATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

**Source Name:** SLIM SAM 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		NWNWNE	24	4S	2W	MADISON

**Period of Diversion:** MAY 1 TO NOVEMBER 15

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

**Period of Use:** MAY 1 TO NOVEMBER 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			NWNWNE	24	4S	2W	MADISON

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
MADISON RIVER  
BASIN 41F**

**Water Right Number:** 41F 30117952 STATEMENT OF CLAIM

**Version:** 2 -- POST DECREE

**Status:** ACTIVE

**Owners:** GARY A CROY  
PO BOX 63  
ENNIS, MT 59729-0063

KIM CROY  
PO BOX 63  
ENNIS, MT 59729

**Priority Date:** MAY 10, 1888

**Type of Historical Right:** DECREED

**Purpose (Use):** STOCK

**\*Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

**\*Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCKWATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

**Source Name:** NORTH MEADOW 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		S2SW	18	4S	1W	MADISON

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

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

2		E2NENW	19	4S	1W	MADISON
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**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

**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			S2SW	18	4S	1W	MADISON
2			E2NENW	19	4S	1W	MADISON