

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: Montana Tunnels Mining Inc.; Elkhorn Tunnels
 LLC

CASE 41I-0114-R-2024
41I 8-00
41I 9-00
41I 10-00

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. Claims 41I 8-00, 41I 9-00, 41I 10-00 are owned by Montana Tunnels Mining Inc. Claim 41I 9-00 is co-owned by

Elkhorn Tunnels Inc. All three claims received issue remarks identifying potential legal or factual issues with water rights. The Water Court is required to resolve these potential issues.

FINDINGS OF FACT

41I 8-00

1. Claim 41I 8-00 was decreed as a sprinkler/flood irrigation claim that diverts water from a spring. The claim was decreed with the following place of use/maximum acres:

<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	20.00		W2NENW	14	7N	4W	JEFFERSON

2. The claim received the following issue remarks:

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.
THE JEFFERSON COUNTY WATER RESOURCES SURVEY (1956) APPEARS TO INDICATE 0.00 ACRES IRRIGATED.
USDA AERIAL PHOTOGRAPH NO(S). 479-154 , DATED 08/29/1979 , APPEARS TO INDICATE 6.25 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.
THE MAXIMUM COMBINED ACRES FOR THIS GROUP OF SUPPLEMENTAL CLAIMS MAY REQUIRE MODIFICATION PENDING RESOLUTION OF MAXIMUM IRRIGATED ACRES ISSUE.

3. The priority date of claim 41I 8-00 is December 30, 1963. Therefore, the 1956 Water Resources Survey issue remark is irrelevant.

4. The DNRC was only able to verify 6.25 acres of irrigation on the 1979 aerial photograph. The 6.25 acres of irrigation were identified in the NENENW of Section 14, T7N, R4W, Jefferson County. A note in the claim file from the original claimant confirms that the place of use is in the NENENW of Section 14, T7N, R4W, Jefferson County.

5. The Court ordered Claimant to file evidence supporting the historical irrigation of all 20.00 acres. Nothing was filed by the deadline. Therefore, the Court ordered Claimant to show cause why the acreage should not be reduced to 6.25 acres as verified by the 1979 aerial photograph. The order stated that if nothing was filed by the deadline, the acreage would be reduced. Nothing was filed by the deadline.

41I 9-00

6. Claim 41I 9-00 was decreed as a sprinkler/flood irrigation claim that diverts water from Spring Creek. The claim was decreed with the following place of use/maximum acres:

Place of Use:							
<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	13.00		S2	NESW	11	7N	4W JEFFERSON
2	29.00		SE	SW	11	7N	4W JEFFERSON
3	3.00		NW	NENW	14	7N	4W JEFFERSON
4	30.00		NW	NW	14	7N	4W JEFFERSON
Total:	<u>75.00</u>						

7. The claim received the following place of use/acres irrigated issue remarks:

THE JEFFERSON COUNTY WATER RESOURCES SURVEY (1956) APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

USDA AERIAL PHOTOGRAPH NO(S). 479-154 , DATED 08/29/1979 , APPEARS TO INDICATE 44.38 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

8. The Court ordered Claimants to file evidence supporting historical irrigation of the claimed 75.00-acre place of use. Nothing was filed by the deadline. Therefore, the Court ordered Claimants to show cause why claim 41I 9-00 should not be dismissed. The Court ordered Claimants to provide evidence showing claim 41I-9 was in use prior to July 1, 1973. The order stated that “if nothing is filed by the November 27, 2024 deadline, claim 41I 9-00 will be dismissed.” Nothing was filed by the deadline.

41I 10-00

9. Claim 41I 10-00 was decreed as a sprinkler/flood irrigation claim for a developed spring in the NWNENE of Section 14, T7N, R4W, Jefferson County for use on 9.00 acres in the NWNW of Section 14, T7N, R4W, Jefferson County. The claim received several issue remarks.

Means of Diversion and Volume

10. Claim 41I 10-00 was decreed as a claim diverting water via developed spring and an onstream reservoir. The claim received the following means of diversion issue remark:

THE MEANS OF DIVERSION APPEARS TO BE INCORRECT. THE MEANS OF DIVERSION APPEARS TO BE A DAM.

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 253 TIMES THE CAPACITY OF THE RESERVOIR.

11. Claim 41I 10-00 was adjudicated by the Water Court during the Basin 41I Temporary Preliminary Decree (TPD). During the TPD, the United States Bureau of Land Management (United States) objected to all elements of claim 41I 10-00. The claim was consolidated into Water Court Case 41I-178. The United States and Montana Tunnels Mining Inc. filed a stipulation resolving the United States' objection to claim 41I 10-00. The stipulation states:

2 The flow rate for Water Right No 41I-W-000010-00 shall be amended to 100 gallons per minute

3 Except as set forth above (supra at paragraph 2), the parties agree that there shall be no further amendments to any temporary preliminary decree, preliminary decree or final decree for Water Right No 41I-W-000010-00

12. Based on the stipulation, the 41I-178 Master's Report recommended:

3 The following change should be made to the flow rate of claim 41I-W-000010-00 as specified in the Stipulation

FLOW RATE 100 00 GPM

4 Ownership, priority date, purpose of right, volume, place of use, maximum acres, point of diversion, means of diversion, period of use and source do not require change on claim 41I-W-000010-00

13. The Master's Report was adopted on March 25, 1998.

Acres Irrigated

14. Claim 41I 10-00 received the following acres irrigated and flow rate issue remarks:

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

THE JEFFERSON COUNTY WATER RESOURCES SURVEY (1956) APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

THE MAXIMUM COMBINED ACRES FOR THIS GROUP OF SUPPLEMENTAL CLAIMS MAY REQUIRE MODIFICATION PENDING RESOLUTION OF MAXIMUM IRRIGATED ACRES ISSUE.

15. The priority date of claim 41I 10-00 is December 30, 1963. Therefore, the 1956 Water Resources Survey is irrelevant.

Period of Diversion

16. Finally, claim 41I 10-00 received the following period of diversion issue remark:

THE CLAIMANT DID NOT IDENTIFY THE PERIOD OF DIVERSION FOR THIS RIGHT. A PERIOD OF DIVERSION HAS BEEN ADDED TO MATCH THE PERIOD OF USE. IF NO OBJECTIONS ARE RECEIVED TO THE PERIOD OF DIVERSION OR PERIOD OF USE, THOSE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS ISSUE REMARK WILL BE REMOVED FROM THIS CLAIM.

17. Claim 41I 10-00 did not receive objections, and the remark served its notice purpose.

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

41I 8-00

1. The acres irrigated issue remark based on the 1979 aerial photograph overcomes the prima facie status of claim 41I 8-00. The evidence shows by a preponderance of the evidence that the historical place of use and maximum acres is 6.25 acres in the NENENW of Section 14, T7N, R4W, Jefferson County.

41I 9-00

2. The acres irrigated issue remarks overcome the prima facie status of claim 41I 9-00. Because Claimant failed to provide evidence showing claim 41I 9-00 was used prior to July 1, 1973, the claim should be dismissed.

41I 10-00

3. The means of diversion, volume, and flow rate issue remarks do not overcome the prima facie status of claim 41I 10-00. Claim 41I 10-00 was adjudicated by the Water Court during the TPD, and these elements were established by the Water Court.

4. The acres irrigated issue remarks do not overcome the prima facie status of claim 41I 10-00. The 1956 aerial photograph predates the priority date of the claim and is therefore irrelevant.

5. The period of diversion notice-type issue remark served its notice purpose.

RECOMMENDATIONS

1. The place of use and maximum acres of claim 41I 8-00 should be modified to 6.25 acres in the NENENW of Section 14, T7N, R4W, Jefferson County.

2. Claim 41I 9-00 should be dismissed.

3. The issue remarks should be removed from the claim abstracts for claims 41I 8-00 and 41I 10-00.

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

ELECTRONICALLY SIGNED AND DATED BELOW.

SERVICE VIA USPS MAIL

Elkhorn Tunnels LLC
143 Union Blvd Ste 900
Lakewood, CO 80228
~~320 W Main St~~
~~Aspen, CO 81611-1614~~

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

Notice: Service List Updated 1.3.25

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

Water Right Number: 411 8-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

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

Priority Date: DECEMBER 30, 1963

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 224.40 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: 6.25

Source Name: SPRING, UNNAMED TRIBUTARY OF SPRING CREEK

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		NENW	14	7N	4W	JEFFERSON

Period of Diversion: MAY 1 TO SEPTEMBER 1

Diversion Means: PUMP

Period of Use: MAY 1 TO SEPTEMBER 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	6.25		NENENW	14	7N	4W	JEFFERSON
Total:	6.25						

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

8-00 9-00 10-00

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

Water Right Number: 411 9-00 STATEMENT OF CLAIM
Version: 5 -- POST DECREE
Status: **DISMISSED**

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

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

Priority Date:

Type of Historical Right:

Purpose (Use): IRRIGATION

Flow Rate:

Volume:

Source Name: SPRING CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

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 10-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

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

Priority Date: DECEMBER 30, 1963

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

***Flow Rate:** 100.00 GPM

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.
PRIMARILY A DIRECT FLOW SYSTEM; VOLUME NOT DECREED.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 9.00

Source Name: SPRING, UNNAMED TRIBUTARY OF SPRING CREEK

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		NWNENE	14	7N	4W	JEFFERSON

***Period of Diversion:** MAY 1 TO AUGUST 1

Diversion Means: DEVELOPED SPRING

WATER FROM THE SPRING FLOWS INTO A RESERVOIR AND THEN CONVEYED BY DITCH TO THE PLACE OF USE.

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	W2NWNE	14	7N	4W	JEFFERSON

Diversion to Reservoir: DIVERSION # 1

Period of Use: MAY 1 TO AUGUST 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	9.00		NWNW	14	7N	4W	JEFFERSON

Total: 9.00

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

8-00

9-00

10-00