

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
(406) 586-4364
1-800-624-3270
watercourt@mt.gov

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

CLAIMANT: Alton Living Trust

OBJECTOR: Alton Living Trust

NOTICE OF INTENT TO APPEAR: United States of America
(Bureau of Reclamation)

CASE 41F-0015-R-2024

41F 122697-00

41F 122701-00

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

Statement of the case

Claimant, Alton Living Trust, filed an objection to the place of use, point of diversion, and means of diversion for stock claim 41F 122697-00 and an objection to the acres irrigated, place of use, point of diversion, and means of diversion for irrigation claim 41F 122701-00. The United States of America (Bureau of Reclamation) filed a notice of intent to appear for irrigation claim 41F 122701-00.

Both claims appeared in the Preliminary Decree with a version of the following notice issue remark.

XXXX WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

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

Montana law requires the Water Court to resolve objections and issue remarks.

On March 5, 2025, Alton Living Trust filed a Motion to Modify Water Right Claims 41F 122697-00 and 41F 122701-00. An order set a filing deadline for the United States of America (Bureau of Reclamation) to file a written statement indicating whether its concerns were addressed by Alton Living Trust’s proposed resolution of self-objections. On March 24, 2025, the United States of America (Bureau of Reclamation) filed its Response to Court Order stating its concerns were resolved by Alton Living Trust’s proposed resolution of self-objections.

Upon review of the proposed resolution for the livestock direct from source portion of stock claim 41F 122697-00, additional evidence was required to support the historical accuracy of the proposed expanded point of diversion and place of use to include the S2SE¹/₄ Section 30, Township 6 South, Range 1 West. The statement of claim and the map attached in support of the statement of claim identified the place of use in Section 30, Township 6 South, Range 1 West as only the E2. The district court decree attached to and in support of the statement of claim identified the place of use as the

SENE, SWNE, and SE of Section 30, Township 6 South, Range 1 West. On April 30, 2025, Alton Living Trust filed a Response to Order Setting Filing Deadline for additional evidence to support the expanded point of diversion and place of use for stock claim 41F 122697-00.

Issues

1. Should the court accept the proposed modifications to the claims?
2. Is the notice issue remark on each claim resolved?

Findings of fact

A preponderance of evidence establishes the following facts:

1. The historically accurate point of diversion for stock claim 41F 122697-00 should be expanded to include the S2SWNE and S2SENE of Section 30, Township 6 South, Range 1 West, Madison County, means of diversion livestock direct from source; and the point of diversion for Thexton Ditch should be modified to the SESWNE of Section 30, Township 6 South, Range 1 West, Madison County, and means of diversion modified to ditch.

2. The historically accurate place of use for stock claim 41F 122697-00 should be expanded to include the S2SENE of Section 30, Township 6 South, Range 1 West, Madison County. The remainder of the place of use should be refined to the SWNE, SENWNE, and the W2NENE of Section 30, the SESE of Section 19, and the SWSW of Section 20 all in Township 6 South, Range 1 West, Madison County.

3. The historically accurate point of diversion for irrigation claim 41F 122701-00 should be modified to the SESWNE of Section 30, Township 6 South, Range 1 West, Madison County, and means of diversion modified to ditch.

4. No water users filed an objection to the ditch name identified by the Preliminary Decree abstract for irrigation claim 41F 122701-00. The ditch name will remain as identified by the Preliminary Decree abstract.

Principles of law

1. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, 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. Settlement, including the documents filed by a claimant where the claimant is the only party, is subject to review and approval by the Water Court. Rule 17(a), W.R.Adj.R.

4. If the settlement agreement expands or enlarges an element of a claim, evidence meeting the burden of proof must be provided. If the evidence does not meet the burden of proof, the element shall not be expanded or enlarged. Rule 17(b), W.R.Adj.R.

5. The Montana Water Court may accept a settlement agreement that reduces or limits an element of a claim and need not determine whether the burden of proof is met unless there is an unresolved issue remark on the claim. Rule 17(c), W.R.Adj.R.

6. 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.

7. 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.

Analysis

Issue 1 – proposed modifications

In its March 5, 2025 Motion to Modify Water Right Claims 41F 122697-00 and 41F 122701-00 ("March 5, 2025 Motion"), Alton Living Trust explained the original claim map for stock claim 41F 122697-00 and irrigation claim 41F 122701-00 incorrectly identified the point of diversion as the location where a ditch discharges into Trail Creek (aka English George Trail Creek). The point of diversion for both claims should instead be identified as the location where water is diverted from the source, "This location is more properly described as the SESWNE of Section 30, Township 6S, Range 1W, where the waters of Trail Creek are captured by one of the Thexton Ditches, as depicted on the original claim map (Exhibit A for claim 41F 122701-00 and Exhibit C for claim 41F 122697-00) and the 1954 Madison County Water Resources Survey map (attached as Exhibit B)." Alton Living Trust's proposed modification to the point of diversion for Thexton Ditch, identified by irrigation claim 41F 122701-00, is supported by the explanation of the system, the map attached to and in support of the statement of claim, and the 1954 Madison County Water Resources Survey map.

Additionally, Alton Living Trust's March 5, 2025 Motion proposed expanding the point of diversion and place of use for stock claim 41F 122697-00 to include "locations along Trail Creek and the Thexton Ditch where livestock drink directly from the ditch." (Exhibit D)

The court requested additional evidence to support the historical accuracy of adding the S2SENE of Section 30, Township 6 South, Range 1 West to the point of diversion and place of use. Alton Living Trust complied with this deadline filing its Response to Order Setting Filing Deadline on April 30, 2025. Alton Living Trust explained due to the modified point of diversion for the Thexton Ditch to its correct location, "the stream reach originally depicted along Trail Creek downstream of the incorrect physical point of diversion on Exhibit Maps C and D is actually located on Trail Creek upstream of the physical diversion point at the Thexton Ditch. These locations on

Trail Creek upstream of the Thexton Ditch, which are depicted on the original claim map as downstream of the incorrect point of diversion, historically involved livestock drinking directly from Trail Creek rather than from a man-made diversion.” Alton Living Trust provided evidence that Alton Living Trust’s predecessors in interest, the Thexton family, were early pioneers in Virginia City and the Madison Valley, buying Thexton Ranch in 1872 from Charles Johnson, also recording the G.T. Brand in 1872, and later receiving a patent for the property where the expanded point of diversion and place of use are located. See Exhibits F-I (specifically Exhibit F, Excerpt from Early Days in the Madison Valley pp. 238-240 under Thexton, George and Thexton, Thomas).

Alton Living Trust’s Motion and Alton Living Trust’s Response, and their exhibits, may be viewed on the court’s case management system, FullCourt Enterprise, at document sequences 4.00 and 8.00.

Conclusions of law

Alton Living Trust provided a preponderance of evidence supporting the modified point of diversion for irrigation claim 41F 122701-00, thereby overcoming the prima facie statement of claim. Alton Living Trust provided a preponderance of evidence supporting the modified point of diversion and place of use for stock claim 41F 122697-00.

The proposed modifications should be accepted by the court thereby resolving Alton Living Trust’s self-objections and the notice of intent to appear filed by the United States of America (Bureau of Reclamation).

Issue 2 – issue remark resolution

Claim 41F 122697-00 received an issue remark providing notice to water users that the point of diversion and means of diversion were modified by DNRC during reexamination. Claim 41F 122701-00 received an issue remark providing notice to water users that the ditch name was modified by DNRC during reexamination. Water users were given the opportunity to review the claims and file an objection. Alton Living Trust’s objection to the point of diversion and means of diversion for claim 41F 122697-

00 were resolved during these proceedings. No water users filed an objection to the ditch name modification for claim 41F 122701-00.

Conclusion of law

The issue remarks appearing on the Preliminary Decree abstracts served their notice purpose.

Recommendations

Stock claim 41F 122697-00 should be modified as follows to accurately reflect historical use.

POINT OF DIVERSION:

	<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
	SESWNE	S WSENW	30	6S	1W	MADISON
Diversion Means:		HEADGATE	DITCH			
Ditch Name:		THEXTON DITCH				
Diversion Means:		S2SENW	30	6S	1W	MADISON
		LIVESTOCK DIRECT FROM SOURCE				
Diversion Means:		S2SWNE	30	6S	1W	MADISON
		LIVESTOCK DIRECT FROM SOURCE				

PLACE OF USE:

	<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
	W2NENE	E 2	30	6S	1W	MADISON
		SENWNE	30	6S	1W	MADISON
		SWNE	30	6S	1W	MADISON
		S2SENW	30	6S	1W	MADISON
		W2	29	6S	1W	MADISON
	SWSW	SW	20	6S	1W	MADISON
	SESE	SE	19	6S	1W	MADISON

Irrigation claim 41F 122701-00 should be modified as follows to accurately reflect historical use.

POINT OF DIVERSION:

	<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
	SESWNE	S WSENW	30	6S	1W	MADISON
Diversion Means:		HEADGATE	DITCH			
Ditch Name:		THEXTON DITCH				

The notice 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

Michael J. L. Cusick
Cusick, Farve & Michael, P.C.
~~**Cusick, Farve, Mattick & Michael, P.C.**~~
~~**PO Box 1288**~~
~~**Bozeman, MT 59771-1288**~~
~~**(406) 587-5511**~~
~~**(406) 587-9079 (Fax)**~~
office@cmrlawmt.com

Alexa Penalosa, Trial Attorney
U.S. Dept of Justice, ENRD-NRS
~~**P.O. Box 7611**~~
~~**Washington, D.C. 20044-7611**~~
~~**(202) 294-3569**~~
Alexa.Penalosa@usdoj.gov
MontanaBasins.ENRD@usdoj.gov

Service List Updated 7/23/2025

\\JUDHLNSRV-DATA\Share\JUDGALH2OSRV (Datavol)\Share\WC-BASIN FOLDERS\41F\41F PD\Cases\15R\MR--41F-15R sjs.docx

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

Water Right Number: 41F 122697-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ALTON LIVING TRUST
PO BOX 4029
WESTLAKE VILLAGE, CA 91359

Priority Date: MAY 1, 1867

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 STOCK WATERING 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: TRAIL CREEK

Source Type: SURFACE WATER

ALSO KNOWN AS ENGLISH GEORGE TRAIL 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		SESWNE	30	6S	1W	MADISON

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DITCH

Ditch Name: THEXTON DITCH

2		S2SENE	30	6S	1W	MADISON
---	--	--------	----	----	----	---------

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

3		S2SWNE	30	6S	1W	MADISON
---	--	--------	----	----	----	---------

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			W2NENE	30	6S	1W	MADISON
2			SESWNE	30	6S	1W	MADISON
3			SWSW	20	6S	1W	MADISON
4			SESE	19	6S	1W	MADISON
5			SWNE	30	6S	1W	MADISON

6S2SENW306S1WMADISON

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

122697-00122701-00

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

Water Right Number: 41F 122701-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ALTON LIVING TRUST
PO BOX 4029
WESTLAKE VILLAGE, CA 91359

Priority Date: MAY 1, 1867

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate:

CLAIMS ALL

*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: 183.50

Source Name: TRAIL CREEK

Source Type: SURFACE WATER

ALSO KNOWN AS ENGLISH GEORGE TRAIL 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		SESWNE	30	6S	1W	MADISON
Period of Diversion:		JUNE 1 TO OCTOBER 15				
Diversion Means:		DITCH				
Ditch Name:		THEXTON DITCH				
Period of Use:		JUNE 1 TO OCTOBER 15				
Place of Use:						

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	57.20		E2NE	30	6S	1W	MADISON
2	79.80		SE	30	6S	1W	MADISON
3	3.50		SESESE	19	6S	1W	MADISON
4	4.00		SWSWSW	20	6S	1W	MADISON
5	39.00		W2W2NW	29	6S	1W	MADISON
Total:		183.50					

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.

122700-00 122701-00 122702-00 122703-00 122704-00 214412-00

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

122697-00 122701-00