

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

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CLAIMANTS: Montana State Board of Land
Commissioners; Blenton Ranch Co.

CASE 41K-0310-R-2024
41K 11389-00
41K 35197-00
41K 160385-00

ORDER SETTING FILING DEADLINE

Claims 41K 35197-00, 41K 11389-00, and 41K 160385-00 appeared in the Preliminary Decree with issue remarks. The Water Court is required by statute to address all issue remarks appearing on a claim. § 85-2-248, MCA.

Case 41K-0310-R-2024 was consolidated to address the issue remarks. The issue remark that is most problematic is the over-filed notice of appropriation issue remark, which states:

THE TYPE OF HISTORICAL RIGHT, PRIORITY DATE, AND FLOW RATE MAY BE QUESTIONABLE. THE CLAIMS FOLLOWING THIS STATEMENT USE THE SAME FILED APPROPRIATION TO DOCUMENT THE RIGHT. THE COMBINED FLOW RATE FOR THIS GROUP OF CLAIMS EXCEEDS THE TOTAL OF THE ORIGINAL APPROPRIATION. 41K 11389-00, 41K 35197-00, 41K 160385-00, 41K 35196-00.¹

This issue remark was added to all three claims after the claims went through Basin 41K Temporary Preliminary Decree proceedings in the 1980s and 1990s. The remark was added because claims 41K 11389-00, 41K 35197-00, and 41K 160385-00 all include the same filed notice of appropriation (NOA) with the Statement of Claim form as evidence in support.

¹ Claim 41K 35196-00 was dismissed in Case 41K 2000-R-2021 pursuant to a Withdrawal filed by the Montana State Board of Land Commissioners.

A filing deadline was set for the claimants to address the overfiled notice of appropriation issue remark. On December 17, 2024, the claimants Blenton Ranch Co. (owner of claim 41K 160385-00) and Montana State Board of Land Commissioners (owner of claims 41K 35197-00 and 41K 11389-00) filed a Stipulation and Settlement Agreement. (Doc.² 10.00).

The Stipulation does not provide sufficient evidence in support. A filing deadline will be set for the parties to address the outstanding issues.

Evidence Attached to Statement of Claim Forms

When Claimants filed water right claims pursuant to § 85-2-221, MCA, they were required to submit:

maps, plats, aerial photographs, decrees, pertinent portions of those documents, or other evidence in support of the claim. All maps, plats, or aerial photographs should show as nearly as possible to scale the point of diversion, place of use, place of storage, and other pertinent conveyance facilities.

§ 85-2-224(2), MCA.

All three claims in this case attached a notice of appropriation (NOA) as evidence in support. Interestingly, there are two different NOAs filed by Henningsen Land Co. attached to claim 41K 35197-00: one for 3.0 cfs from Meadow Creek with an October 2, 1919 priority date (NOA No. 84000), and one for 3.0 cfs of water from Seepage Creek with an October 2, 1919 priority date (NOA No. 84002).³ The claim files for claims 41K 11389-00 and 41K 160385-00 include only the NOA No. 84002 from Seepage Creek.

Accordingly, the sum of the flow rates of the three claims in this case exceed the flow rate identified in the documents attached to the Statement of Claim forms which were provided as evidence in support of the claims. Accordingly, the DNRC added the overfiled notice of appropriation issue remarks to each of the claims.

² “Doc.” numerical references correlate to case file docket numbers in the Water Court’s Full Court case management system.

³ The full 3.0 cfs flow rate of the NOA from Meadow Creek is claimed by 41K 160879-00. The place of use and point of diversion for claim 41K 35197-00 is aligned with the Seepage Creek NOA and the Claimant identified Seepage Creek as the Source for claim 41K 35197-00 in the Statement of Claim filing document. The Meadow Creek NOA will not be considered a basis for claim 41K 35197-00 unless the parties assert otherwise, which may require claim 41K 160879-00 be added to the case.

Owner	Claim Number	Priority Date	Flow Rate in Preliminary Decree
TLMD	41K 11389-00	October 2, 1919	255.82 gpm (0.57 cfs)
TLMD	41K 35197-00	October 2, 1919	3.00 cfs
Blenton Ranch	41K 160385-00	October 2, 1919	3.00 cfs

The DNRC Over-Filed Issue Remarks Are Not in Error

Because claims 41K 35197-00, 41K 11389-00, and 41K 160385-00 all identify NOA No. 84002 as evidence in support, the DNRC appropriately added the overfiled notice of appropriation issue remark.

When determining whether there is an overfiled notice of appropriation situation, the DNRC identifies “all water rights that lay claim to the same historical filing.” DNRC 2024 Reexamination Manual, at 90. The issue before the Court concerns the fact that all three claims use the same piece of evidence to support each of the rights (NOA No. 84002). That issue was not addressed by the Court during previous proceedings. The fact that other issues and objections related to claims 41K 11389-00, 41K 35197-00, and 41K 160385-00 were previously addressed by the Court does not insulate the claims from having to address and resolve the overfiled notice of appropriation issue.

Order Addressing Reexamination – Overfiled NOAs

In 2012, the Montana Water Court issued an Order Addressing Reexamination. The Order goes through the history of the claim examination process and explains that prior to the adoption of the Water Right Claim Examination Rules (effective July 15, 1987), the DNRC reviewed claims using a “verification” process.

The Order explains that overfiled notices of appropriation were not subject to consistent review during the verification process and that the inconsistent review may create problems for future enforcement of Water Court decrees. Accordingly, the Water Court ordered the DNRC to review claims for overfiled notices of appropriation (among

other issues) using the current DNRC examination procedures and to add the corresponding issue remark when appropriate.

The Temporary Preliminary Decree for Basin 41K was issued May 14, 1985, which predates the Water Right Claim Examination Rules. The addition of the overfiled notice of appropriation issue remarks to claims 41K 11389-00, 41K 35197-00, and 41K 160385-00 complied with the Water Court's Reexamination Order and was not in error. The addition of the issue remarks is consistent with the Water Court's stated purpose in issuing the Reexamination Order.

The Overfiled NOA Issue Remarks Are Not Resolved

To resolve the overfiled NOA issue remark, the parties suggest changing claim 41K 11389-00 to a use right, with a priority date of October 3, 1919. The parties assert "no further evidence is required pursuant to Rule 17(c), W.R.Adj.R. when a claimant agrees to waive the advantages of Mont. Code Ann. § 85-2-227 and reduce an element of its claim." The parties mischaracterize the requested modification as a reduction.

Modifying a claim from a filed right to a use right requires the presentation of evidence establishing a different basis for the claim than the notice of appropriation that was attached to the statement of claim form. Evidence of an additional and separate water right is required.

Additionally, the parties seem to suggest that the overfiled notice of appropriation issue remark is not appropriate because the three claims are from different sources. First of all, whether the claims are in fact diverting from separate sources remains unclear and was not established during previous proceedings.⁴ Second, even if they are diverting from separate sources, the issue remains that the same evidence in support is attached to each of the claim filing documents. An NOA for 3.0 cfs is insufficient to support three separate claims when the sum of the flow rates for those claims exceeds 3.0 cfs.

⁴ At best, previous proceedings establish that claims 41K 35197-00 and 41K 160385-00 use different methods of diversion.

The Stipulation cannot be accepted by the Court without further presentation of evidence supporting a total flow rate of the sum of the three claims (6.57 cfs) as of the requested priority dates.

Accordingly, it is

ORDERED that the filing deadline for the parties to file additional evidence to support their Stipulation OR to amend their Stipulation is **April 11, 2025**.

ELECTRONICALLY SIGNED AND DATED BELOW.

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