

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

MONTANA WATER COURT  
UPPER MISSOURI DIVISION  
MADISON RIVER  
BASIN 41F  
PRELIMINARY DECREE

\*\*\*\*\*

CLAIMANT: United States, DOA Forest Service

CASE 41F-0250-R-2026

41F 54292-00

NOTICE OF INTENT TO APPEAR: Bring Em LLC

**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 have **13 days** from the service date of the notice of filing of this report to file a written objection or request an extension of the objection period. Rule 23, Water Right Adjudication Rules; Rule 6, Montana Rules of Civil Procedure. 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**

United States, DOA Forest Service (“Forest Service”) stock claim 41F 54292-00 received the following issue remarks:

THE PLACE OF USE APPEARS TO NEED MODIFICATION BASED ON THE DNRC CORRECTION TO THE POINT OF DIVERSION. THE CORRECT PLACE OF USE FOR ID 4 IS S2S2 SEC 30, T4S, R2W AND THE CORRECT PLACE OF USE FOR ID 5 IS N2NW SEC 31, T4S, R2W.

POINT OF DIVERSION AND PLACE OF USE 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.

Bring Em LLC filed a notice of intent to appear for stock claim 41F 54292-00 “to monitor, and to the extent necessary, participate in resolution of DNRC’s issue remarks...”

Issue remarks result from Department of Natural Resources and Conservation (“DNRC”) claims examination. Montana law requires the Water Court to resolve issue remarks and notices of intent to appear.

The issue remark concerning modification of the elements by DNRC was resolved by information before the court. The issue remark concerning possible modification of the place of use to match the point of diversion was not resolved through the objection process and while there appeared to be enough information in the claim file and before the court to resolve the issue remark, pursuant to § 85-2-248(11), MCA the court may not resolve an issue remark modifying an element without agreement from the claimant. An order set a filing deadline for the Forest Service to file its agreement with the modifications identified by the issue remark or to file evidence supporting the historically accurate place of use for stock claim 41F 54292-00. The order stated that notice of intent to appear party Bring Em LLC, would be provided time to comment on whether its concerns for claim 41F 54292-00 were resolved by resolution of the issue remark. The Forest Service filed its Response to Court Order by the deadline, agreeing with the place of use issue remark.

An order set a filing deadline for Bring Em LLC to file a statement concerning whether its concerns were addressed by the modification proposed by the place of use issue remark appearing on stock claim 41F 54292-00. Bring Em LLC filed its Agreement with Resolution by the deadline.

## Issues

1. What is the historically accurate place of use for stock claim 41F 54292-00?
2. Is Bring Em LLC's notice of intent to appear for stock claim 41F 54292-00 resolved?

## Findings of fact

1. The place of use for stock claim 41F 54292-00 should be modified as follows to accurately reflect historical use:
  - for ID No. 4 the S2S2 of Section 30, Township 4 South, Range 2 West, Madison County, and
  - for ID No. 5 the N2NW of Section 31, Township 4 South, Range 2 West, Madison County.
2. Bring Em LLC's notice of intent to appear concerns for stock claim 41F 54292-00 are resolved.

## 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. 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.

## **Analysis**

### **Issues 1 and 2 – issue remark resolution and notice of intent to appear resolution**

The Forest Service’s Response confirmed the historical accuracy of the place of use identified by the issue remark appearing on claim 41F 54292-00.<sup>1</sup>

Stock claim 41F 54292-00 appeared in the Preliminary Decree with the additional following issue remark:

POINT OF DIVERSION AND PLACE OF USE 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.

Water users were given the opportunity to review the claim and file an objection. The deadline to file objections passed. No water users filed objections against the claim, and the referenced notice issue remark served its purpose.

Bring Em LLC confirmed its notice of intent to appear concerns were resolved by the modified place of use and resolution of the issue remarks.

## **Conclusions of law**

The place of use issue remark, the information resulting in the issue remark, and the Forest Service’s Response in agreement with the issue remark overcome, by a preponderance of evidence, the prima facie proof afforded the place of use for claim 41F 54292-00. The place of use issue remark is resolved.

The issue remark noting DNRC modified elements of stock claim 41F 54292-00 served its notice purpose.

---

<sup>1</sup> The Forest Service filed an objection to the place of use identified by claim 41F 54292-00 during Temporary Preliminary Decree proceedings. The court adopted the Forest Service’s proposed modified place of use during Temporary Preliminary Decree proceedings. The modification made by this Master’s Report is a further refinement of the place of use.

The modified place of use and resolution of the issue remarks resolve the concerns of notice of intent to appear party Bring Em LLC.

**Recommendations**

Stock claim 41F 54292-00 should be modified as follows to accurately reflect historical use.

**PLACE OF USE:**

<u>ID</u>	<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
4		S2S2	30	4S	2W	MADISON
5		N2NW	31	4S	2W	MADISON

The issue remarks appearing on the claim should be removed.

A Post Decree Abstract of Water Right Claim accompanies 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:**

Romney S. Philpott, Trial Attorney  
US Department of Justice  
ENRD, Natural Resources Section  
romney.philpott@usdoj.gov  
montanabasins.enrd@usdoj.gov

Kirsa Shelkey  
Western Roots Law PLLC  
shelkey@westrootslaw.com  
Johnson@westrootslaw.com  
(Atty for: Bring Em LLC)

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

**Water Right Number:** 41F 54292-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** USA (DEPT OF AGRICULTURE FOREST SERVICE)  
WATER RIGHTS PROGRAM MANAGER, NORTHERN REGION  
26 FORT MISSOULA RD  
MISSOULA, MT 59804-7203

**Priority Date:** OCTOBER 3, 1905

**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 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:** SOUTH 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		S2	28	4S	2W	MADISON
<b>Period of Diversion:</b>	JUNE 1 TO OCTOBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
2		S2	29	4S	2W	MADISON
<b>Period of Diversion:</b>	JUNE 1 TO OCTOBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
3		S2S2	30	4S	2W	MADISON
<b>Period of Diversion:</b>	JUNE 1 TO OCTOBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
4		N2NW	31	4S	2W	MADISON
<b>Period of Diversion:</b>	JUNE 1 TO OCTOBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
5		S2	25	4S	3W	MADISON
<b>Period of Diversion:</b>	JUNE 1 TO OCTOBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					

**Period of Use:** JUNE 1 TO OCTOBER 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			S2	25	4S	3W	MADISON
2			S2	28	4S	2W	MADISON
3			S2	29	4S	2W	MADISON
4			S2S2	30	4S	2W	MADISON
5			N2NW	31	4S	2W	MADISON