

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

CLAIMANT: Montana State Board of Land Commissioners –
Forestry and Trust Lands Division

OBJECTOR: Montana State Board of Land Commissioners –
Forestry and Trust Lands Division

CASE 41F-0174-R-2026
41F 21846-00
41F 215357-00

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 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

Stock claim 41F 21846-00 received the following issue remarks:

POINT OF DIVERSION AND RESERVOIR RECORD 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.

PURSUANT TO WATER COURT ORDER, IF NO OBJECTIONS TO THIS CLAIM ARE FILED, THE CLAIMED WILL BE REINSTATED.¹

Irrigation claim 41F 215357-00 also received the following issue remarks:

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

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

CLAIM FILED LATE 06/27/1996. IN ADDITION TO BEING SUBORDINATE TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW, THIS RIGHT MAY ALSO BE SUBORDINATE TO CERTAIN PERMITS AND RESERVATIONS OF WATER. SEE SECTION 85-2-221 MCA.

THE MADISON COUNTY WATER RESOURCES SURVEY (1954) APPEARS TO INDICATE 40.00 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

USDA AERIAL PHOTOGRAPH NO. 178-313, DATED 09/09/1979 APPEARS TO INDICATE 83.00 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

THE PRIORITY DATE MAY BE QUESTIONABLE. IT IS UNCLEAR WHETHER THE ATTACHED DOCUMENTATION SUPPORTS THE CLAIMED PRIORITY DATE.

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

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

Irrigation claim 41F 215357-00 also received self-objections from claimant Montana State Board of Land Commissioners – Forestry and Trust Lands Division (“Trust Lands”) to the flow rate, volume, maximum acres irrigated, place of use, priority date, and type of historical right. Attached to the self-objection was a Trust Lands’ Verified Motion to Amend Water Right Claim 41F 215357-00.

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

¹ The issue remark omits the element that may be added to the abstract. However, flow rate is the only blank element.

Issues

1. Are the State of Montana's objections to irrigation claim 41F 215357-00 resolved?
2. Are the issue remarks on the claims resolved?

Findings of fact

1. Statement of claim 41F 21846-00 identifies a 2.00 GPM flow rate. The flow rate is afforded prima facie proof. The 2.00 GPM identified by the statement of claim is historically accurate and should be added to the abstract of claim 41F 21846-00.
2. The historically accurate elements for irrigation claim 41F 215357-00 are:
 - Priority date: July 31, 1954
 - Flow rate: 3.14 CFS
 - Maximum Acres: 83.00

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. 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.

5. 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 and objection resolution

Stock claim 41F 21846-00 received an issue remark noting DNRC modified the point of diversion and reservoir record during claims examination and an issue remark noting that the 2.00 GPM flow rate for the claim may be reinstated. The point of diversion and reservoir record issue remark instructed claimant and other water users that if no objections were filed to the point of diversion and reservoir record, the modified elements would remain as they appear on the Preliminary Decree abstract. The flow rate issue remark instructed claimant and other water users that if no objections were filed to the flow rate, the 2.00 GPM flow rate would be reinstated. No objections were filed to the claim. The point of diversion and reservoir record should remain as identified by the Preliminary Decree abstract, and the 2.00 GPM flow rate for stock claim 41F 21846-00 should be reinstated.

Trust Lands' Verified Motion to Amend irrigation claim 41F 215357-00 proposed reductions to the priority date, flow rate, and maximum acres irrigated, and confirmed the type of historical right and place of use legal land description identified by the Preliminary Decree abstract. The modifications proposed by Trust Lands resolve its objection and the issue remarks appearing on the claim.

Irrigation claim 41F 215357-00 included an issue remark questioning the type of historical right. The type of historical right was blank on the statement of claim. However, the claim appeared in the Preliminary Decree for this basin as a “use” right. The issue remark references documentation submitted with the statement of claim. This

documentation explains: 1) the different types of transactions resulting in the creation of School Trust Lands for the State of Montana, 2) how the priority date would be identified based upon each type of transaction, and 3) that water is reserved for School Trust Lands. However, for purposes of this adjudication, water right claims on school trust lands are not considered “reserved” water rights. *See Department of State Lands v. Pettibone*, 216 Mont. 361, 376, 702 P.2d 948, 957 (1985). In addition, Rule 2(a)(58), W.R.C.E.R., defines Reserved Water Rights as a “right to use water that is expressly or impliedly reserved by treaty, an act of Congress, or an executive order.” In this adjudication, reserved rights are held by the United States or by the Indian Tribes. The claim is not held by either of those entities, nor is the claim in the category of rights that would be reserved. Trust Lands confirms that the type of historical right should be “use” and, that it did not intend to claim 41F 215357-00 as a “reserved” right.

Trust Lands reduced the maximum acres irrigated to the number of acres noted by the issue remark referencing the 1979 aerial photograph and reduced the flow rate based upon the reduced number of acres irrigated.

Trust Lands reduced the priority date to the submission date of the Madison County Water Resources Survey to Governor Aronson - July 1954. The year 1954 is also referenced by one of the two maximum acres irrigated issue remarks, confirming the claim was in use by July 1954.

Claim 41F 215357-00 was filed after the April 30, 1982, claim filing deadline expired. As a result, the claim is defined as a “late claim” under § 85-2-102(15), MCA, and was deemed forfeit pursuant to § 85-2-226, MCA. In 1993, the Montana Legislature enacted § 85-2-221(3), MCA, and provided for the remission of forfeiture of late claims, subject to specified terms and conditions. This claim is a “remitted” late claim.

The abstract of claim 41F 215357-00 appeared with an issue remark citing § 85-2-221(3), MCA, advising water users that the claim may be subordinate, and therefore junior, to certain permits and reservations of water. Persons holding a post-June 30, 1973 permit or reservation, who relied to their detriment on the failure of a claimant to timely file a claim, were required to file an objection and thereby seek the subordination of any

remitted late filed claim to their permit or reservation.

Claim 41F 215357-00 received an issue remark noting it missed the first decree for Basin 41F issued in 1984. This issue remark provided notice to water users that the claim was not previously decreed.

Water users were given the opportunity to review irrigation claim 41F 215357-00 and file an objection. The deadline to file objections expired. The only objection filed to claim 41F 215357-00 is resolved by these case proceedings.

Conclusions of law

No objections were filed against stock claim 41F 21846-00. The point of diversion and reservoir record should remain as identified by the Preliminary Decree abstract, and the 2.00 GPM flow rate for stock claim 41F 21846-00 should be reinstated. The issue remarks on the claim are resolved.

For irrigation claim 41F 215357-00, the modified priority date, flow rate, and maximum acres irrigated are reductions within the parameters of the prima facie statement of claim. The reductions to these elements resolve the issue remarks concerning the elements. Trust Lands' confirmation of the type of historical right resolves the issue remark questioning the type of historical right appearing on claim 41F 215357-00. The record before the court justifies the modifications proposed by Trust Lands' Verified Motion to Amend Water Right Claim 41F 215357-00 and resolves Trust Lands' objection to claim 41F 215357-00.

The issue remarks on irrigation claim 41F 215357-00 noting the lack of the claim's inclusion in the previous Basin 41F decree and its late claim status served their notice purpose.

Recommendations

Stock claim 41F 21846-00 should be modified as follows to accurately reflect historical use.

FLOW RATE: **BLANK** **2.00 GPM**

Irrigation claim 41F 215357-00 should be modified as follows to accurately reflect historical use.

PRIORITY DATE: ~~AUGUST 3, 1878~~ **JULY 31, 1954**

Enforceable Priority Date: JUNE 30, 1973

FLOW RATE: ~~5.25 CFS~~ **3.14 CFS**

MAXIMUM ACRES: ~~140.00~~ **83.00**

PLACE OF USE:

	<u>ACRES</u>	<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
TOTAL:	140.00 83.00		W2	16	6S	1W	MADISON

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 21846-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: MONTANA STATE BOARD OF LAND COMMISSIONERS
FORESTRY AND TRUST LANDS DIVISION
PO BOX 201601
HELENA, MT 59620-1601

Priority Date: JULY 1, 1950

Type of Historical Right: USE

Purpose (Use): STOCK

Flow Rate: 2.00 GPM

***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: WASTE & SEEPAGE, UNNAMED TRIBUTARY OF ODELL 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		NESEW	16	7S	1W	MADISON

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

Diversion Means: DAM

***Reservoir:** OFFSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SESW	16	7S	1W	MADISON

Diversion to Reservoir: DIVERSION # 1

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			SWNWSE	16	7S	1W	MADISON

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

Water Right Number: 41F 215357-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Late Claim: B

Owners: MONTANA STATE BOARD OF LAND COMMISSIONERS
FORESTRY AND TRUST LANDS DIVISION
PO BOX 201601
HELENA, MT 59620-1601

Priority Date: JULY 31, 1954

Enforceable Priority Date: JUNE 30, 1973

CLAIM FILED LATE 06/27/1996. AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 3.14 CFS

***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: 83.00

Source Name: ODELL 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		NWNWSW	16	6S	1W	MADISON

Period of Diversion: MAY 1 TO OCTOBER 1

Diversion Means: HEADGATE

Period of Use: MAY 1 TO OCTOBER 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	83.00		W2	16	6S	1W	MADISON

Total: 83.00