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FILED
01/18/2024
Sara Calkins
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Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
41K-0236-R-2023
White, Eugene
7.00

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

CLAIMANT: USA (Department of Agriculture Forest Service)

CASE 41K-0236-R-2023

41K 56711-00
41K 56712-00
41K 56719-00
41K 56723-00

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

All water right claims that appeared in the Preliminary Decree for Sun River (Basin 41K) were subject to "issue remarks" resulting from pre-decree reexamination by the DNRC, objections, and counterobjections. The above-captioned claims received an issue remark during the DNRC's review of the claims.

Claims 41K 56711-00, 41K 56712-00, 41K 56719-00, and 41K 56723-00 were consolidated into Case 41K-0236-R-2023 and an Order Setting Filing Deadline was issued by the Water Court requesting any additional information needed to resolve the issue remarks.

FINDINGS OF FACT

1. Claim 41K 56711-00 received the following substantive issue remarks:

AN AMENDMENT WAS SUBMITTED ON 08/13/2020 REQUESTING TO AMEND THE FLOW RATE. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

THE FLOW RATE IS MISSING.

POINT OF DIVERSION WAS 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.

- Claim 41K 56712-00 received the following substantive issue remarks:

AN AMENDMENT WAS SUBMITTED ON 08/13/2020 REQUESTING TO AMEND THE FLOW RATE. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

THE FLOW RATE IS MISSING.

POINT OF DIVERSION WAS 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.

- Claim 41K 56719-00 received the following substantive issue remarks:

AN AMENDMENT WAS SUBMITTED ON 08/13/2020 REQUESTING TO AMEND THE FLOW RATE. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

THE FLOW RATE IS MISSING.

Claim 41K 56723-00 received the following substantive issue remarks:

AN AMENDMENT WAS SUBMITTED ON 8/13/2020 REQUESTING TO AMEND THE FLOW RATE. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

AN AMENDMENT WAS SUBMITTED ON 8/13/2020 REQUESTING TO AMEND THE POINT OF DIVERSION, PLACE OF USE, AND FLOW RATE. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

THE FLOW RATE IS MISSING.

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE SPRING CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

2. On May 31, 2023, Claimant United States Department of Agriculture, Forest Service (“Forest Service”) filed a *Response* which reiterated that the previously filed amendments resolved the issue remark and brought the claims into historical conformity.

3. On August 15, 2023, the Court issued a second filing deadline for the Claimant to file additional information regarding its desire to quantify the flow rates of the above captioned claims, and to address the point of diversion issue remark appearing on claim 41K 56723-00.

4. On October 25, 2023, Claimant United States Department of Agriculture, Forest Service (“Forest Service”) filed a second *Response* which denotes that the claims are for livestock drinking from a developed spring which does require a quantified flow rate. However, the second *Response* also states that the previously filed amendments contained errors regarding the requested modification to the flow rates of each claim. Further, the second *Response* states that restoring the flow rates and volumes to the values found in the original filings would resolve the flow rate issue remarks. Finally, the second *Response* also addresses the point of diversion remark appearing on claim 41K 56723-00 stating that upon further review, the second amendment filed for the claim requested modification of the point of diversion to and place of use to NWSWNW of Sec 36, Twp 19N, Rge 7W, however, the correct legal land description for the point of diversion and place of use is actually in the NWSWSW of Sec 36. The second *Response*

included attachments of proposed abstract requesting the following modifications to the claims:

41K 56711-00

Maximum 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.~~ **.007 CFS**

Maximum 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.~~ **.44 AF**

41K 56712-00

Maximum 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.~~ **.007 CFS**

Maximum 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.~~ **.44 AF**

41K 56719-00

Maximum 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.~~ **.010 CFS**

Maximum 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.~~ **1.10 AF**

41K 56723-00

Maximum 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.~~ **.010 CFS**

Maximum 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.~~ **.44 AF**

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	NWSWSW	SWSW	36	19N	9W	LEWIS AND CLARK

Period of Diversion: JULY 1 TO SEPTEMBER 30

Diversion Means: SPRING BOX

Period of Use: JULY 1 to SEPTEMBER 30

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		NWSWSW	SWSW	36	19N	9W	LEWIS AND CLARK

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. 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.

CONCLUSIONS OF LAW

1. The proposed modifications contained in the Forest Service’s second *Response* resolve the issue remarks appearing on the claims. Based on the information contained in the Forest Service’s second *Response*, along with the information contained in the attached proposed abstracts, the claims should be modified as described in Finding of Fact No. 4¹. The modifications resolve the issue remarks, and the issue remarks should be removed from the claims.
2. The notice-type issue remarks appearing on claims 41K 56711-00 and 41K 56712-00 served their notice purpose and should be removed from the claims.

¹ Based on Rule 4 WRCER, the 0.007cfs flow rate quantification for claims 41K 56711-00 and 41K 56712-00 will be converted to 3.14gpm and the .01cfs flow rate quantification for claims 41K 56719-00 and 41K 56723-00 will be converted to 4.49gpm.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court modify the claims as described in Finding of Fact No. 4 and remove all issue remarks from the claims.

Post decree abstracts of the water right claims reflecting the recommended changes are attached to this Report.

ELECTRONICALLY SIGNED AND DATED BELOW.

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\\JUDHLNSRV-DATA\Share\JUDGALH2OSRV (Datavol)\Share\WC-BASIN FOLDERS\41K PD\41K Cases\236\41K-0236-R-2023 MR (multiple claims, response resolves IRs use mod in response not MTA) 1-3-24.jbc.docx

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
SUN RIVER
BASIN 41K**

Water Right Number: 41K 56711-00 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: JULY 1, 1900

Type of Historical Right: USE

Purpose (Use): STOCK

Flow Rate: 3.14 GPM

Volume: 0.44 AC-FT

Source Name: SPRING, UNNAMED TRIBUTARY OF SMITH 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		NWSWSE	13	19N	9W	LEWIS AND CLARK

Period of Diversion: JULY 1 TO SEPTEMBER 30

Diversion Means: SPRING BOX

Period of Use: JULY 1 TO SEPTEMBER 30

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			SWSE	13	19N	9W	LEWIS AND CLARK

SECTION 13 IS PROTRACTION BLOCK PB41

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
SUN RIVER
BASIN 41K**

Water Right Number: 41K 56712-00 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: JULY 1, 1900

Type of Historical Right: USE

Purpose (Use): STOCK

Flow Rate: 3.14 GPM

Volume: 0.44 AC-FT

Source Name: SPRING, UNNAMED TRIBUTARY OF PETTY 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		NWSWSW	13	19N	9W	LEWIS AND CLARK

Period of Diversion: JULY 1 TO SEPTEMBER 30

Diversion Means: SPRING BOX

Period of Use: JULY 1 TO SEPTEMBER 30

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			SWSW	13	19N	9W	LEWIS AND CLARK

SECTION 13 IS PROTRACTION BLOCK PB41.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
SUN RIVER
BASIN 41K**

Water Right Number: 41K 56719-00 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: JULY 1, 1900

Type of Historical Right: USE

Purpose (Use): STOCK

Flow Rate: 4.49 GPM

Volume: 1.10 AC-FT

Source Name: SPRING, UNNAMED TRIBUTARY OF LEAVITT 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		NW	21	21N	9W	LEWIS AND CLARK

Period of Diversion: JULY 1 TO SEPTEMBER 30

Diversion Means: SPRING BOX

Period of Use: JULY 1 TO SEPTEMBER 30

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			NW	21	21N	9W	LEWIS AND CLARK

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
SUN RIVER
BASIN 41K**

Water Right Number: 41K 56723-00 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: JUNE 30, 1973

Type of Historical Right: USE

Purpose (Use): STOCK

Flow Rate: 4.49 GPM

Volume: 0.44 AC-FT

Source Name: SPRING, UNNAMED TRIBUTARY OF JAKIE 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		NWSWSW	36	19N	9W	LEWIS AND CLARK

Period of Diversion: JULY 1 TO SEPTEMBER 30

Diversion Means: SPRING BOX

Period of Use: JULY 1 TO SEPTEMBER 30

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			NWSWSW	36	19N	9W	LEWIS AND CLARK