

Montana Water Court
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FILED
01/03/2024
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
41K-0437-R-2023
White, Eugene
3.00

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

CLAIMANTS: State of Montana Dept. of Natural Resources;
Nilan Water Users Association

CASE 41K-0437-R-2023

41K 119362-00

41K 119364-00

NOTICE OF INTENT TO APPEAR: LF Ranch MT, 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 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, conclusion 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 examination by the DNRC, objections, and counterobjections. Claims 41K 119362-00 and 41K 119364-

00 each received issue remarks during the DNRC's review of the claims. The claims were consolidated into Case 41K-0437-R-2023 and an Order Setting Filing Deadline was issued by the Water Court to resolve the issue remarks.

FINDINGS OF FACT

1. Claim 41K 119362-00 received the following substantive issue remark:

THE POINT OF DIVERSION APPEARS TO BE INCORRECT. THE POINT OF DIVERSION APPEARS TO BE IN THE NESWNE SEC 4 TWP 19N RGE 8W LEWIS AND CLARK COUNTY.

2. On September 19, 2023, the Water Court consolidated the claims and issued an Order Setting Filing Deadline. Nothing was filed at the ordered deadline by either of the claimants. The Order Setting Filing Deadline included the following language regarding the above-listed issue remark:

ORDERED that the Claimants review this order and, *if necessary*, file a statement of why the point of diversion of claim 41K 119362-00 should not be modified as described in the above-listed issue remark by **Wednesday, October 18, 2023**. *If nothing is filed by the deadline, this Master will conclude that the Claimants agree to the proposed modification to the point of diversion of claim 41K 119362-00, the point of diversion will be modified from the NWSENE of Section 4, Twp 19N, Rge 8W in Lewis and Clark County to the NESWNE of Section 4, Twp 19N, Rge 8W in Lewis and Clark County, and the issue remark will be removed from the claim.*

3. On October 18, 2023, NOIA party LF Ranch MT, LLC filed a *Response*. LF Ranch's *Response* states that LF Ranch agrees with the point of diversion identified by the issue remark.

4. Each of the claims also received a notice-type issue remark stating that the ditch name was modified by the DNRC during its claims reexamination. No Objections were filed.

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. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. 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 information in the record resolves the point of diversion issue remark appearing on claim 41K 119362-00. Based on the Claimant fact that the Claimants did not file anything to the contrary, and the *Response* filed at the filing deadline by NOIA party LF Ranch stating its agreement with the proposed modification, a preponderance of the evidence shows that the point of diversion of claim 41K 119362-00 should be modified from the NWSENE of Section 4, Twp 19N, Rge 8W in Lewis and Clark County to the NESWNE of Section 4, Twp 19N, Rge 8W in Lewis and Clark County and the issue remark should be removed from the claim.

2. The notice type issue remarks appearing on the claims served their notice purpose and should be removed from the claims.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Water Master recommends that the Court modify the point of diversion of claim 41K 119362-00 as described in Conclusion of Law No. 1 and remove the 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.

Service via USPS Mail:

State of Montana Dept. of Natural Resources
Nilan Dam
1424 9th Ave.
P.O. Box 201601
Helena, MT 59620-1601

Nilan Water Users Association
P.O. Box 486
Augusta, MT 59410

Service Via Electronic Mail:

Benjamin Sudduth
Sudduth Law PLLC
P.O. Box 507
Bozeman, MT 59771-0507
(406) 272-2390
Benjamin@Sudduthlaw.com

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM**

**SUN RIVER
BASIN 41K**

Water Right Number: 41K 119362-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: NILAN WATER USERS ASSOCIATION

PO BOX 486
AUGUSTA, MT 59410

MONTANA, STATE OF DEPT OF NATURAL RESOURCES

NILAN DAM
1424 9TH AVE
PO BOX 201601
HELENA, MT 59620 1601

OWNERSHIP UPDATE PROCESSED TO ADD NEW OWNERS. THE WATER RIGHT MAY BE SPLIT INTO SEPARATE WATER RIGHTS UPON REQUEST OF THE OWNERS.

***Priority Date:** AUGUST 30, 1950

Type of Historical Right: FILED

***Purpose (use):** SALE

THIS RIGHT INCLUDES WATER STORAGE AS PROVIDED FOR IN SECTION 89-121 R.C.M. (1947) (REPEALED). THIS RIGHT DIVERTS WATER INTO NILAN RESERVOIR FOR LATER RELEASE TO WATER PURCHASERS. THE HISTORIC USES OF THIS WATER INCLUDE IRRIGATION AND STOCK WATER.

Flow Rate: 200.00 CFS

THE COMBINED FLOW RATE FOR CLAIMS 41K 119362-00 AND 41K 119364-00 IS LIMITED TO THE HISTORIC CAPACITY OF THE DIVERSION STRUCTURES AND CONVEYANCE SYSTEM.

THE COMBINED FLOW RATES FOR DIVERSIONS BY CLAIMS 41K 119362-00 AND 41K 30046594 CANNOT EXCEED 200.00 CFS.

***Volume:** 14,130.00 AC-FT

THE COMBINED VOLUME OF CLAIMS 119362-00 AND 119364-00 SHALL NOT EXCEED 14,130 ACRE-FEET.

THE VOLUME REFLECTS HISTORIC DIVERSION FOR RESERVOIR STORAGE, AND INCLUDES DEAD STORAGE, EVAPORATION, AND PARTIAL REFILL, WHEN WATER IS AVAILABLE.

Climatic Area: 3 - MODERATE

GENERAL SERVICE AREA

Source Name: SMITH 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		NESWNE	4	19N	8W	LEWIS AND CLARK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

Ditch Name: NILAN SUPPLY CANAL

***Reservoir:** OFFSTREAM **Reservoir Name:** NILAN RESERVOIR, NORTH DAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SWSENE	18	20N	7W	LEWIS AND CLARK

Diversion to Reservoir: DIVERSION # 1

Dam Height: 34.00 FEET

Surface Area: 535.00 ACRES

Capacity: 10,092.00 ACRE-FEET

***Reservoir:** OFFSTREAM **Reservoir Name:** NILAN RESERVOIR, EAST DAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	W2SENE	20	20N	7W	LEWIS AND CLARK

Diversion to Reservoir: DIVERSION # 1

Dam Height: 44.00 FEET

Surface Area: 535.00 ACRES

Capacity: 10,092.00 ACRE-FEET

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

(STORAGE)

APRIL 1 TO SEPTEMBER 30

(SALE)

***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			W2SENE	20	20N	7W	LEWIS AND CLARK
2			SWSENE	18	20N	7W	LEWIS AND CLARK

PLACE OF USE #1 IS THE EAST DAM AND PLACE OF USE #2 IS THE NORTH DAM

THE PLACE OF USE FOR SALE OF WATER IS THE LOCATION OF THE OUTLET WORKS AT THE NORTH AND EAST DAM SITES AT NILAN RESERVOIR.

THE GENERAL SERVICE AREA FOR THE NILAN PROJECT INCLUDES THE FOLLOWING LOCATIONS:

T19N R6W LEWIS AND CLARK COUNTY

T19N R7W LEWIS AND CLARK COUNTY

T19N R8W LEWIS AND CLARK COUNTY

T20N R5W LEWIS AND CLARK COUNTY

T20N R6W LEWIS AND CLARK COUNTY

T20N R7W LEWIS AND CLARK COUNTY

T20N R8W LEWIS AND CLARK COUNTY

T21N R6W LEWIS AND CLARK COUNTY

T21N R7W LEWIS AND CLARK COUNTY

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.

119362-00

119364-00

IMPLIED CLAIM NO. 41K 30046594 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.

THE CLAIMANT MUST COMPLY WITH THE REQUIREMENTS OF TITLE 85, CHAPTER 2 PART 4 OF THE MONTANA CODE ANNOTATED BEFORE CONTRACTING TO SELL WATER TO ANY PARTY FOR ANY USE OTHER THAN IRRIGATION AND STOCK WATER.

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

Water Right Number: 41K 119364-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: MONTANA, STATE OF DEPT OF NATURAL RESOURCES
NILAN DAM
1424 9TH AVE
PO BOX 201601
HELENA, MT 59620 1601

***Priority Date:** AUGUST 30, 1950

Type of Historical Right: FILED

***Purpose (use):** SALE

THIS RIGHT INCLUDES WATER STORAGE AS PROVIDED FOR IN SECTION 89-121 R.C.M. (1947) (REPEALED). THIS RIGHT DIVERTS WATER INTO NILAN RESERVOIR FOR LATER RELEASE TO WATER PURCHASERS. THE HISTORIC USES OF THIS WATER INCLUDE IRRIGATION AND STOCK WATER.

***Flow Rate:** 300.00 CFS

THE COMBINED FLOW RATE FOR CLAIMS 41K 119362-00 AND 41K 119364-00 IS LIMITED TO THE HISTORIC CAPACITY OF THE DIVERSION STRUCTURES AND CONVEYANCE SYSTEM.

***Volume:** 14,130.00 AC-FT

THE COMBINED VOLUME OF CLAIMS 119362-00 AND 119364-00 SHALL NOT EXCEED 14,130 ACRE-FEET.

THE VOLUME REFLECTS HISTORIC DIVERSION FOR RESERVOIR STORAGE, AND INCLUDES DEAD STORAGE, EVAPORATION, AND PARTIAL REFILL, WHEN WATER IS AVAILABLE.

Climatic Area: 3 - MODERATE

GENERAL SERVICE AREA

Source Name: FORD 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	26	20N	8W	LEWIS AND CLARK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

Ditch Name: NILAN SUPPLY CANAL

***Reservoir:** OFFSTREAM **Reservoir Name:** NILAN RESERVOIR, NORTH DAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SWSENE	18	20N	7W	LEWIS AND CLARK

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Surface Area: 535.00 ACRES
Capacity: 10,092.00 ACRE-FEET

***Reservoir:** OFFSTREAM **Reservoir Name:** NILAN RESERVOIR, EAST DAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	W2SENE	20	20N	7W	LEWIS AND CLARK

Diversion to Reservoir: DIVERSION # 1
Dam Height: 44.00 FEET
Surface Area: 535.00 ACRES
Capacity: 10,092.00 ACRE-FEET

***Period of Use:** JANUARY 1 TO DECEMBER 31
 FOR STORAGE
 APRIL 1 TO SEPTEMBER 30
 FOR SALE

***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			W2SENE	20	20N	7W	LEWIS AND CLARK
2			SWSENE	18	20N	7W	LEWIS AND CLARK

PLACE OF USE #1 IS THE EAST DAM, PLACE OF USE #2 IS THE NORTH DAM
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 T19N R6W LEWIS AND CLARK COUNTY
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 T19N R8W LEWIS AND CLARK COUNTY
 T20N R5W LEWIS AND CLARK COUNTY
 T20N R6W LEWIS AND CLARK COUNTY
 T20N R7W LEWIS AND CLARK COUNTY
 T20N R8W LEWIS AND CLARK COUNTY
 T21N R6W LEWIS AND CLARK COUNTY
 T21N R7W LEWIS AND CLARK COUNTY

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.

AUTHORIZATION TO CHANGE THE POD COMPLETED 07/29/1979. FILE REFLECTS RIGHT AS IT EXISTED PRIOR TO JULY 1973. APPROVED CHANGES WILL BE RECORDED AFTER FINAL DECREE. SEE 41K 119364-00 .

THE CLAIMANT MUST COMPLY WITH THE REQUIREMENTS OF TITLE 85, CHAPTER 2 PART 4 OF THE MONTANA CODE ANNOTATED BEFORE CONTRACTING TO SELL WATER TO ANY PARTY FOR ANY USE OTHER THAN IRRIGATION AND STOCK WATER.