

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

MONTANA WATER COURT, UPPER MISSOURI DIVISION  
MISSOURI RIVER FROM SUN RIVER TO MARIAS RIVER - BASIN 41Q  
INTERLOCUTORY DECREE

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CLAIMANT: High 5 Slopeside LLC

OBJECTOR: United States of America (USDA  
Forest Service)

CASE 41Q-0021-I-2023

41Q 30134862

**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**  
**FINDINGS OF FACT**

1. Claim 41Q 30134862 appeared in the 41Q Interlocutory Decree. It received an objection from the United States Department of Agriculture Forest Service (the United States) and DNRC issue remarks.

2. Claim 41Q 30134862 is for domestic use from an undeveloped spring. It was submitted to the DNRC on June 25, 2019 as an exempt claim. An exempt claim is an existing water right for livestock and individual uses based on instream flow or ground water sources.... Section 85-2-222(1), MCA.

Claim 41Q 30134862 received the following DNRC issue remarks:

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 41Q DECREE ISSUED 05/27/2010.

THIS CLAIM DOES NOT APPEAR TO MEET THE DEFINITION OF AN EXEMPT RIGHT UNDER SECTION 85-2-222(1), MCA.

The first issue remark is considered a notice issue remark. It is placed on the claim to provide notice that it has not previously appeared in a decree. It has served its purpose of providing notice and should be removed from the claim.

The second issue remark was placed on the claim because the Interlocutory Decree identified the means of diversion as bucket. To be considered exempt, surface water domestic claims must be instream diversions, meaning there is no manmade diversion structure.

3. On October 18, 2023, the parties filed a Stipulation to resolve the issues in this case. In the Stipulation, the parties agree that claim 41Q 30134862 is an exempt claim and the means of diversion should be modified from “bucket” to “instream”.

The parties explain that the Statement of Claim form for claim 41Q 30134862 identified the means of diversion as “instream” but that the DNRC changed the diversion means to bucket and added the 10-gpm flow rate without a signed amendment or a reference to a claim examination rule.

Under the DNRC’s Claims Examination Manual describes exempt claims as:

**"Exempt Water Right"** means an existing water right for which a statement of claim did not have to be filed pursuant to [§85-2-222, MCA](#). This includes 1) **domestic use based on instream use with no man-made diversion**, 2) domestic use based on a groundwater source, 3) stockwater based on instream use with no man-made diversion, 4) stockwater use based on a groundwater source, 5) appropriations of groundwater put to use between January 1, 1962 and July 1, 1973 with a notice filed under the 1961 Ground Water Code.

The claimant reports that the place of use was historically used as a base camp for sheep herding. There are no structures on the property. Water from the spring was historically used for drinking and cleaning. There is no evidence that there is a manmade diversion associated with claim 41Q 30134862.

The information provided by the parties and the information in the claim file supports modifying the means of diversion from bucket to instream. The modification resolves the means of diversion issue remark.

4. The parties also request that the flow rate of 10 gpm is removed and instead the flow rate should be replaced with the following information remark:

A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FROM SOURCE DOMESTIC USE. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

The information remark adequately describes the flow rate and is appropriate for an instream use.

5. Claim 41Q 30134862 appeared in the Basin 41Q Interlocutory Decree with two listed priority dates:

**Priority Date:** SEPTEMBER 23, 1923  
**Enforceable Priority Date:** SEPTEMBER 28, 1923

The information in the claim file supports a priority date of September 28, 1923. The discrepancy between the listed priority date and the enforceable priority date appears to be a typographical error. The priority date should be identified as September 28, 1923.

## CONCLUSIONS OF LAW

1. A properly filed claim of an existing right or an amended claim of existing right is prima facie proof of its content. § 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

The parties provided sufficient information to explain the means of diversion for claim 41Q 30134862 and to support the means of diversion being modified to instream.

2. Settlement agreements are subject to review and approval of the Water Court. Rule 17(a), W.R.Adj.R. The settlement documentation in this Case should be accepted by the Court.

3. Section 85-2-248(2), MCA requires the Water Court to resolve all issue remarks that are not resolved through the objection process. 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. § 85-2-248(3), MCA. The issue remarks appearing on claim 41Q 30134862 have been resolved based on the terms of the Stipulation.

4. The Water Court may correct a clerical mistake or a mistake arising from oversight or omission where one is found in a part of the record. Rule 60(a), M.R.Civ.P. The error in how the priority date appeared on the Preliminary Decree version of the abstract amounts to a clerical mistake and should be corrected.

## RECOMMENDATIONS

1. Claim 41Q 30134862 should be modified as provided above.
2. The issue remarks should be removed from claim 41Q 30134862.

A Post Decree Abstract of Water Right Claim is served with the Report to confirm that the recommended modifications have been made in the state's centralized record system.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

**Service via USPS Mail:**

High 5 Slopeside LLC  
104 4<sup>th</sup> St. N Suite 301  
Great Falls, MT 59401  
(406) 781-3553  
jmadill@453rent.com

**Service via Electronic Mail:**

Judith E. Coleman  
Trial Attorney  
US Dept of Justice, ENRD-NRS  
PO Box 7611  
Washington, DC 20044-7611  
(202) 514-3553  
[judith.coleman@usdoj.gov](mailto:judith.coleman@usdoj.gov)  
[MontanaBasins.ENRD@USDOJ.GOV](mailto:MontanaBasins.ENRD@USDOJ.GOV)

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**MISSOURI RIVER, FROM SUN TO MARIAS RIVERS**  
**BASIN 41Q**

**Water Right Number:** 41Q 30134862 STATEMENT OF CLAIM

**Version:** 2 -- POST DECREE

**Status:** ACTIVE

**Owners:** HIGH 5 SLOPESIDE LLC  
104 4TH ST. N SUITE 301  
GREAT FALLS, MT 59401

**Priority Date:** SEPTEMBER 28, 1923

**Type of Historical Right:** USE

**Purpose (use):** DOMESTIC

**Flow Rate:**

A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FROM SOURCE DOMESTIC USE. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

**Volume:** 1.10 AC-FT

**Households:** 1

**Source Name:** SPRING, UNNAMED TRIBUTARY OF O'BRIEN 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	4	NESENE	29	13N	8E	CASCADE

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

**Diversion Means:** INSTREAM

**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		4	NESENE	29	13N	8E	CASCADE