

FILED
NOV 29 1993
Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN (43B)
* * * * *

IN THE MATTER OF THE ADJUDICATION OF)	CASE 43B-156
THE EXISTING RIGHTS TO THE USE OF ALL)	
THE WATER, BOTH SURFACE AND UNDERGROUND,)	43B-W-193560-00
WITHIN THE YELLOWSTONE RIVER ABOVE AND)	43B-W-193561-00
INCLUDING ALL TRIBUTARIES OF THE)	43B-W-193562-00
YELLOWSTONE RIVER ABOVE AND INCLUDING)	43B-W-193563-00
BRIDGER CREEK IN GALLATIN, PARK, SWEET)	43B-W-193564-00
GRASS AND STILLWATER COUNTIES, MONTANA.)	43B-W-194521-00

CLAIMANT: Daniel L. Voyich, Dolly Burk, Century Warehousing, Inc.

OBJECTOR: Daniel L. Voyich, Dolly Burk, John E. Dunn
James and Wanda Brown, Milesnick Ranch
Wayne and Rosalene Peterson, Century Warehousing, Inc.

ORDER ADOPTING MASTER'S REPORT

Pursuant to Montana Code Annotated, §85-2-233(4), the above entitled case was assigned to Senior Water Master Kathryn L. W. Lambert. On November 1, 1993 the Senior Water Master issued a report containing Findings of Fact and Conclusions of Law. Copies of the report were served upon the parties. Over ten (10) days have elapsed since service, and no objections to the Findings and Conclusions have been filed by any party.

The Court has reviewed carefully the Senior Water Master's Findings and Conclusions. Pursuant to Rule 53(e), Montana Rules of Civil Procedure, the Court adopts the Master's Report and

ORDERS that changes recommended in the Master's Conclusions of Law be made to the abstract of claim(s) listed above as they appear in the Temporary Preliminary Decree of the Yellowstone River Above and Including Bridger Creek Basin (43B)

DATED this 26 day of November, 1993.


C. Bruce Loble
Chief Water Judge

CERTIFICATE OF SERVICE

I, Judith A. Salvas, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above ORDER ADOPTING MASTER'S REPORT was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Daniel L. Voyich
P. O. Box 410
Livingston, MT 59047

Wayne & Rosaline Peterson
602 Comet Blvd.
Livingston, MT 59047

Dolly Burk
1211 Yellow Pine Dr.
Missoula, MT 59801

Kent Douglass, Attorney
206 E. Callender
Livingston, MT 59047

David W. DePuy, Attorney
P. O. Box 487
Livingston, MT 59047

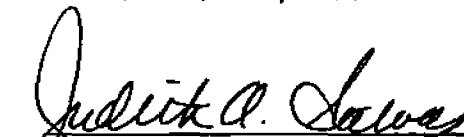
Tom Milesnick
5808 Dry Creek Road
Belgrade, MT 59714

John E. Dunn
483 Fleshman
Livingston, MT 59047

James & Wanda Brown
Box 158
Livingston, MT 59047

Milesnick Ranch
%J. Stanley Milesnick
412 Bridger View Dr.
Belgrade, MT 59714

DATED this *29th* day of *November*, 1993.



Judith A. Salvas
Deputy Clerk

IN THE WATER COURT OF THE STATE OF MONTANA

* * * * *

FILED

NOTICE OF FILING OF MASTER'S REPORT

NOV - 1 1993

Montana Water Court

TO: ALL PARTIES

RE: CASE 43B-156; 43B-W-193560-00, 43B-W-193561-00, 43B-W-193562-00,
43B-W-193563-00, 43B-W-193564-00 and 43B-W-194521-00

This is to provide you with Notice that the Water Master has filed a Master's Report (Findings of Fact and Conclusions of Law) with the Clerk of the Water Court for the water right(s) listed above. A copy of the Master's Report is enclosed with this Notice.

Please review this Master's Report carefully. If there are any corrections or changes that need to be made, you have 10 days from service of this Notice to file a written objection. You must mail a copy of your written objection to all the other parties who have been involved in this proceeding and file a certificate of such mailing with the Water Court. (This procedure is required by Rule 1.II. Water Right Claims Examination Rules and by Rules 5 and 53 of the Montana Rules of Civil Procedure.)

DATED this 1st day of November, 1993.

LORI M. BURNHAM
Clerk of Court
Montana Water Court
P. O. Box 879
Bozeman, MT 59771-0879
(406) 586-4364
1-800-624-3270 (in Montana)

Montana Water Court
PO Box 879
Bozeman, MT 59771-0879
1-800-624-3270 (In-state only)
(406) 586-4364

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IN THE WATER COURT OF THE STATE OF MONTANA
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IN THE MATTER OF THE ADJUDICATION OF) CASE 43B-156
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BRIDGER CREEK IN GALLATIN, PARK, SWEET) 43B-W-194521-00
GRASS AND STILLWATER COUNTIES, MONTANA.)

CLAIMANT: Daniel L. Voyich, Dolly Burk, Century Warehousing, Inc.

OBJECTOR: Daniel L. Voyich, Dolly Burk, John E. Dunn
James and Wanda Brown, Milesnick Ranch
Wayne and Rosaline Peterson, Century Warehousing, Inc.

MASTER'S REPORT

The hearing of this matter was held before Water Master Kathryn L. W. Lambert on July 11, 1990 in the Community Room, Park County Courthouse, Livingston, Montana.

Kent Douglass appeared on behalf of Wayne Peterson and Rosalene Peterson. Wayne Peterson testified. Exhibits 1P through 10P, 12P and 13P were admitted without objection.

Tom Milesnick appeared on behalf of himself and Milesnick Ranch.

Wanda Brown appeared on her own behalf.

John Dunn appeared on his own behalf. Exhibits 1D through 4D were admitted without objection.

David W. DePuy appeared on behalf of Dolly Burk and Daniel L. Voyich. Daniel L. Voyich and Joe Lawellin testified. Exhibits 1V through 31V were admitted without objection.

At the close of the testimony the parties agreed to a field investigation to determine the number of acres irrigated in section 23. On July 16, 1990 an Order For Field Investigation was entered.

On August 20, 1990 the Field Investigation Report was filed by Rusty Taylor, Water Resource Specialist III, Montana

Department of Natural Resources and Conservation.

Post-trial briefs were filed by David W. DePuy, Kent Douglass and John Dunn.

Upon review of the Statements of Claim, testimony, exhibits, post-trial briefs and the Field Investigation Report the following Findings of Fact and Conclusions of Law are made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Conclusions of Law 1) The Water Court has jurisdiction to review all objections to temporary preliminary decrees pursuant to Mont. Code Ann. §85-2-233.

Conclusions of Law 2) The Water Court has jurisdiction over all matters relating to the determination of existing water rights and may consider a matter within the Court's jurisdiction on its own Motion. Mont. Code Ann. §3-7-224.

Finding of Fact 1) The source of all these claimed rights is currently called Fleshman Creek. Historically it has been referred to as Fleishman Creek.

43B-W-193560-00

Finding of Fact 2) Wayne Peterson and Rosalene Peterson objected to the acres irrigated of this Dolly Burk and Daniel L. Voyich irrigation claim.

Finding of Fact 3) At the hearing David W. DePuy stated that the claimants were withdrawing this claim as it duplicates claim 43B-W-193562-00.

Conclusion of Law 3) As this claim has been withdrawn it should not appear in the Preliminary or Final Decree of the Yellowstone River Basin Above and Including Bridger Creek Basin (43B).

43B-W-193561-00

Finding of Fact 4) Wayne Peterson and Rosalene Peterson objected to the ownership of this Dolly Burk and Daniel L. Voyich irrigation claim.

Finding of Fact 5) Daniel L. Voyich and Dolly Burk filed a Notice of Intent to Appear.

Conclusion of Law 4) The priority date, place of use,

maximum acres irrigated and flow rate were not included in the Peterson timely filed objection. It is clear that inclusion of these issues in the hearing is in effect an amendment of the pleadings under Rules 15(a) and 15(b) Mont. R. Civ. P. The timely filed objection of the Petersons was therefor amended to include priority date, place of use, maximum acres irrigated, and flow rate.

Finding of Fact 6) This claim is for 225.00 miners inches of Fleshman Creek, high or flood water only, priority date December 31, 1907.

Finding of Fact 7) The March 25, 1982 Affidavits of Norris B. Spangler and John W. Hankins are attached to the Statement of Claim. Mr. Spangler has been familiar with the Voyich field in section 23 since 1908 and Mr. Hankins has been familiar with the same field since 1913. Both Affidavits state that as much water as was wanted has been taken and used to irrigate that field as far back as they can recall. There is no specific mention of high water, just that the different owners have always taken as much water as they wanted.

Finding of Fact 8) The April 22, 1985 Affidavit of James A. Dunn was attached to the Peterson objection. It states on page 2 "In 1930, we had one water right decree of 90 inches to use on Section 23, Township 2 South, Range 9 East. Any flood water rights beyond 90 inches was after the other decreed rights."

Finding of Fact 9) Joe Lawellin testified that he recalls taking as much water as he wanted when he and his father irrigated section 23 for owner Mike Bryeson in 1934.

Finding of Fact 10) Daniel Voyich testified that he has been using high or flood water in April or May of every year. He testified that he takes as much as he wants just as everyone else does on Fleshman Creek.

Conclusion of Law 5) As this is a use right, the priority date should be the date of first use.

Conclusion of Law 6) As high or flood waters were used in 1908, the priority date should be changed to April 1, 1908.

Finding of Fact 11) The Temporary Preliminary Decree states that the number of maximum acres irrigated is 103.00.

Finding of Fact 12) The maximum acres irrigated should

be 92.00.

Finding of Fact 13) The Temporary Preliminary Decree states that the place of use is:

<u>ACRES</u>	<u>QTR.SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>
17.00	NENW	23	02S	09E	Park
25.00	SESW	23	02S	09E	Park
5.00	NESW	23	02S	09E	Park
36.00	NWNE	23	02S	09E	Park
19.00	SWNE	23	02S	09E	Park
<u>1.00</u>	NWSE	23	02S	09E	Park
Total 103.00					

Finding of Fact 14) The place of use should be:

<u>ACRES</u>	<u>QTR.SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>
13.30	E2NENW	23	02S	09E	Park
21.40	SESW	23	02S	09E	Park
3.50	N2NESW	23	02S	09E	Park
33.50	NWNE	23	02S	09E	Park
19.80	SWNE	23	02S	09E	Park
<u>0.50</u>	NWNWSE	23	02S	09E	Park
Total 92.00					

Finding of Fact 15) The Temporary Preliminary Decree states that the flow rate is 3.90 cfs (156.00 miners inches) which is 1.50 miner's inches per acre.

Finding of Fact 16) Due to the reduction in maximum acres irrigated, the flow rate should be reduced to 3.45 cfs (138.00 miners inches). It is noted that the total flow of this right and the 1872 right is 5.70 cfs (228.00 miner's inches) which is commensurate with the wear marks in the throat of the Voyich Parshall flume. Dan Voyich testified that the wear marks reached .54 of a foot on the flume which converts to a flow of "two hundred some inches".

Conclusion of Law 7) The maximum acres irrigated, place of use and flow rate should be changed as specified in Findings of Fact 12, 14 and 16.

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Finding of Fact 17) Wayne Peterson and Rosalene Peterson objected to the ownership of this Dolly Burk and Daniel L. Voyich irrigation claim.

Conclusion of Law 8) The place of use and maximum acres irrigated were not included in the Peterson timely filed objection.

It is clear that inclusion of these issues in the hearing is in effect an amendment of the pleadings under Rules 15(a) and 15(b) Mont. R. Civ. P. The timely filed objection of the Petersons was therefor amended to include place of use and maximum acres irrigated.

Finding of Fact 18) Daniel L. Voyich and Dolly Burk filed a Notice of Intent to Appear.

Finding of Fact 19) The Temporary Preliminary Decree states that the number of maximum acres irrigated is 103.00.

Finding of Fact 20) The maximum acres irrigated should be 92.00.

Finding of Fact 22) The Temporary Preliminary Decree states that the place of use is:

<u>ACRES</u>	<u>QTR.SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>
17.00	NENW	23	02S	09E	Park
25.00	SENW	23	02S	09E	Park
5.00	NESW	23	02S	09E	Park
36.00	NWNE	23	02S	09E	Park
19.00	SWNE	23	02S	09E	Park
<u>1.00</u>	NWSE	23	02S	09E	Park
Total 103.00					

Finding of Fact 23) The place of use should be:

<u>ACRES</u>	<u>QTR.SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>
13.30	E2NENW	23	02S	09E	Park
21.40	SENW	23	02S	09E	Park
3.50	N2NESW	23	02S	09E	Park
33.50	NWNE	23	02S	09E	Park
19.80	SWNE	23	02S	09E	Park
<u>0.50</u>	NWNWSE	23	02S	09E	Park
Total 92.00					

Conclusion of Law 9) The changes to maximum acres irrigated and place of use specified in Findings of Fact 20 and 23 should be made to correct the Temporary Preliminary Decree of the Yellowstone River Above and Including Bridger Creek Basin (43B).

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Finding of Fact 24) Century Warehousing, Inc., Wayne Peterson, Rosalene Peterson, John Dunn, Jim Brown, Wanda Brown, Stan Milesnick and Tom Milesnick objected to the ownership of this Dolly Burk and Daniel L. Voyich irrigation claim.

Finding of Fact 25) Daniel L. Voyich and Dolly Burk filed a Notice of Intent to Appear.

Finding of Fact 26) On January 8, 1990 Century Warehousing, Inc. filed a Withdrawal of Objection which does not specify any changes to be made.

Finding of Fact 27) The following history details the use and ownership of this water right.

A. This claim was decreed in case number 2566, Sixth Judicial District, Park County, Montana, by the Hon. Frank Henry on May 23, 1907. Paragraph I states:

That the plaintiff, the Livingston Land & Irrigation Company, a corporation, is the owner of and in possession of and entitled to the possession of all of the Northwest Quarter of Section Twenty-Three and the Northwest Quarter of Section Twenty-Two in Township Two South of Range Nine East, containing in all, three hundred and twenty acres, more or less, according to United States Government survey, and that the said plaintiff is the owner of and is entitled to the use and enjoyment of Ninety (90) Inches, or a flow equivalent to Two and One Fourth (2 1/4) Cubic Feet per second of time of the waters of Fleishman Creek, and its tributaries, appropriated March 1st, 1872, for the necessary irrigation of the lands above described.

2. That the plaintiff, the Livingston Land & Irrigation Company, a corporation, is the owner of and in possession of and entitled to the possession of all the land described in the preceding paragraph and that the said plaintiff is the owner of and entitled to the use and enjoyment of Ninety (90) Inches or a flow equivalent to Two and One-Fourth (2 1/4) Cubic Feet per second of time of the waters of Fleishman Creek, appropriated July 3rd, 1889, for the necessary irrigation of the lands

above described.

The Complaint filed by the Livingston Land and Irrigation Company initiating the suit which resulted in the Decree above, alleges a water right for 120 inches, priority date June 1, 1889. Judge Henry reduced the right to 90 inches and determined that the priority date was July 3, 1889. The Complaint specifies that the 1889 water right was used on section 22 and that the 1876 (alleged an 1876 priority date which Judge Henry found to be 1872) water right was used on section 23. Although the Complaint specifically ties the 1889 right to section 22 and the 1876 right to section 23, the Decree is more general and does not make that distinction.

B. On March 1, 1915 The Yellowstone Valley Land and Irrigation Company (the new name of the Livingston Land & Irrigation Company) leased the northwest quarter of section 22 to Joseph Spangler. The lease specifies the use of the July 3, 1889 Fleishman Creek water right.

C. On March 1, 1919 The Yellowstone Valley Land and Irrigation Company leased the northwest quarter of section 22 to C. Roup. The lease specifies the use of the July 3, 1889 Fleishman Creek water right.

D. On March 30, 1927 a Warranty Deed was entered between the Yellowstone Valley Land & Irrigation Company and Ella K. Break. This Deed transfers 160 acres in the northwest quarter of section 22 "TOGETHER, with all the tenements, hereditaments, appurtenances, water rights and water ditches to the same belonging." There is no specific water right or priority date listed.

E. On January 8, 1934 Ella K. Break and R. Break filed a Quit Claim Deed transferring the northwest quarter of section 22 to O. T. Connelley. No specific water right is named but the Deed does state "...together with all the tenements, hereditaments, and appurtenances thereunto belonging."

F. On March 1, 1945 a Warranty Deed was filed between Orlando T. Connelley and Ruby E. Connelley, his wife, to Tam Bare and Donald Bare. This Deed states "Together with all water rights, and rights in ditches, canals and laterals, and rights of way therefor, appurtenant to said premises or used in connection therewith, including the following: 90 inches of waters of Fleshman Creek appropriated 1889." (emphasis added).

G. On February 10, 1955 Tam Bare, Carrie L. Bare and Donald Bare entered a Warranty Deed transferring the northwest quarter of section 22 to Obie Signs, Inc. The Deed transfers all appurtenances. Specific water rights are not listed.

H. In 1955 Judge Benjamin E. Berg drafted a document entitled "Water Rights Fleshman Creek". The eighth right is the July 3, 1889 90 inch right. Under "present owner" it says "Mr Bare, Not used f-- many years."

I. On June 23, 1961 Donald Bare, Tam Bare and Louise Bare entered a Warranty Deed transferring a one acre parcel within the northwest of section 22 to Ernest F. Morgan and Georgia Morgan. No water rights were specified but all appurtenances were transferred.

J. On April 30, 1964 a Final Order of Condemnation was entered by Hon. George J. Allen, Sixth Judicial District, Park County, Montana. Approximately 30.81 acres were condemned for construction of Interstate 90.

K. On May 4, 1966 Tam Bare, Louise Bare and Donald Bare entered into a Warranty Deed transferring 3.12 acres to John W. Nelson and Gladys V. Nelson. No specific water right is listed but all "...appurtenances, water rights and water ditches..." were transferred.

L. On September 30, 1970 Tam B. Bare and Carrie Louise Bare entered a Warranty Deed transferring 2.00 acres to Thomas G. Mustagog and Margaret A. Mustagog. No specific water right is listed but all "...appurtenances, water rights and water ditches..." were transferred.

M. On November 13, 1972 Tam B. Bare and Carrie Louise Bare entered a Warranty Deed transferring 71.65 acres in section 22 to Thomas G. Mustagog and Margaret A. Mustagog. The Deed states:

There is also included all water rights appurtenant to said premises, including but not necessarily limited to: 90 Miner's Inches of the waters of Fleshman Creek, as decreed to the Livingston Land and Irrigation Co. as of date July 3, 1889, in that certain action in the District Court of the

Sixth Judicial District of the State of Montana, entitled "Livingston Land and Irrigation Co., Plaintiff, v. William Alkire, et al. Defendants" by Decree dated June 3, 1907.

(emphasis added).

N. On April 6, 1977 a Sheriff's Deed was filed which transfers the 71.65 acres in section 22 from the Sheriff of Park County to Empire Federal Savings and Loan Association of Livingston. Using the same language as quoted above, the Deed also transfers the July 3, 1889 water right for 90 inches with the property.

O. On May 19, 1978 an Abstract of Contract for Deed was entered between Empire Federal Savings and Loan Association of Livingston, Montana and Century Warehousing, Inc., Garth R. Sime and Gene E. Cook. This also uses the same language found in M. above to transfer the 1889 water right with the property.

P. On November 22, 1988 Garth R. Sime executed a Warranty Deed transferring his undivided one-third interest in the 71.65 acres and the 1889 water right for 90 inches to George E. Cook and Alice M. Cook.

In summary, it appears that the 1889 right was historically used on section 22 and was specifically identified and transferred in some of the documents conveying section 22. There is no evidence that this water right was used in section 23 prior to the sale of section 22 to Ella Break in 1927.

Finding of Fact 28) Dan Voyich testified that he and his family always thought that the 1889 water right was purchased by Luis Voyich when he purchased section 23, and therefore, the 1889 water right had not been transferred by the Yellowstone Valley Land & Irrigation Company when it sold the northwest quarter of section 22 to Ella Break. He testified that he has been irrigating the ranch since at least 1955 and has, on occasion, used the 1889 water right during the high or flood water season.

Conclusion of Law 10) Since enacted in 1895 Montana statutes have defined appurtenances as follows:

Appurtenances. A thing is deemed incidental or appurtenant to land when it is by right used with the

land for its benefit, as in the case of a way, or watercourse, or a passage for light, air, or heat from or across the land of another.

Sec. 67-211 R.C.M., currently sec. 70-15-105 Mont. Code Ann.

Conclusion of Law 11) Appurtenances are transferred with the land unless expressly reserved. *Tucker v. Jones*, 8 Mont. 225, 16 P. 571 (1888) and *Smith v. Denniff*, 24 Mont. 20, 57 P. 557 (1900).

Conclusion of Law 12) As the 1889 water right was first used on section 22, it became an appurtenance to section 22.

Conclusion of Law 13) As an appurtenance to section 22, the 1889 water right has been transferred with section 22 because there have been no express reservations of that water right in the chain of title documents.

Finding of Fact 29) The chain of title of section 23 does not include any mention of the 1889 water right as an appurtenance to section 23. Since the issuance of the 1907 Decree all the transfer documents for section 23 refer generally to appurtenances or to appurtenant water rights. No water right or rights were ever identified.

Conclusion of Law 14) The 1889 water right was not used to irrigate section 23 prior to the 1927 transfer of section 22 to Ella Break and therefore was not an appurtenance to section 23.

Conclusion of Law 15) As the 1889 water right was not an appurtenance to section 23 it was not transferred as an appurtenance through the various transfers of section 23.

Conclusion of Law 16) As the 1889 water right was already appurtenant to section 22 when it was transferred to Ella Break in 1927 and as there is no language in any of the transfers

of sections 22 and 23 specifying a joint tenancy of the 1872 and 1889 water rights, the allegations of joint tenancy need not be addressed.

Finding of Fact 30) The current owner of section 22 is Century Warehousing, Inc.

Conclusion of Law 17) As Dolly Burk and Daniel Voyich are not the owners of section 22, they have no basis for claiming the ownership of the appurtenant 1889 water right.

Conclusion of Law 18) Claim 43B-W-193563-00 should be dismissed and should not appear in the Preliminary or Final Decree of the Yellowstone River Above and Including Bridger Creek Basin (43B)

43B-W-193564-00

Finding of Fact 31) Century Warehousing, Inc., Wayne Peterson, Rosalene Peterson, John Dunn, Jim Brown, Wanda Brown, Stan Milesnick and Tom Milesnick objected to the ownership of this Dolly Burk and Daniel L. Voyich irrigation claim.

Finding of Fact 32) Daniel L. Voyich and Dolly Burk filed a Notice of Intent to Appear.

Finding of Fact 33) On January 8, 1990 Century Warehousing, Inc. filed a Withdrawal of Objection which does not specify any changes to be made.

Finding of Fact 34) At the hearing David W. DePuy stated that the claimants were withdrawing this claim as it duplicates claim 43B-W-193563-00.

Conclusion of Law 19) As this claim has been withdrawn it should not appear in the Preliminary or Final Decree of the Yellowstone River Above and Including Bridger Creek Basin (43B).

43B-W-194521-00

Finding of Fact 35) Daniel L. Voyich and Dolly Burk objected to the ownership, priority date, purpose of right, volume, place of use, acres irrigated, source, flow rate, point of diversion, means of diversion, period of use and alleged that the

claimant Century Warehousing, Inc. does not have an irrigation right for Fleshman Creek water. This claim is for the 1889 Fleshman Creek water right which is appurtenant to section 22.

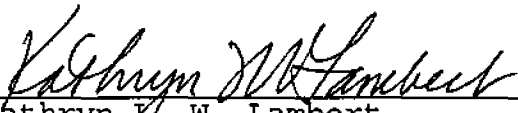
Finding of Fact 36) Century Warehousing, Inc. filed a Notice of Intent to Appear.

Finding of Fact 37) On December 12, 1989 Century Warehousing, Inc. filed a Withdrawal of Claim which states:

It was the intent to use the water, but due to the condition of the ditches, and no use for many years, claimant withdraws his claim.

Conclusion of Law 20) As this claim has been withdrawn it should not appear in the Preliminary or Final Decree of the Yellowstone Basin Above and Including Bridger Creek Basin (43B).

DATED this 29 day of October, 1993.


Kathryn W. Lambert
Senior Water Master

CERTIFICATE OF SERVICE

I, Judith A. Salvas, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above MASTER'S REPORT was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Daniel Voyich
P. O. Box 410
Livingston, MT 59047

Wayne & Rosaline Peterson
602 Comet Blvd.
Livingston, MT 59047

David W. DePuy, Attorney
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Kent Douglass, Attorney
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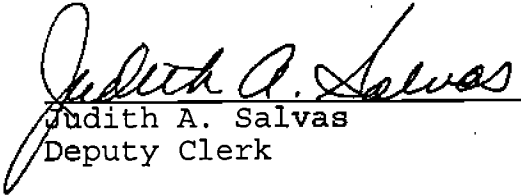
Dolly Burk
1211 Yellow Pine Dr.
Missoula, MT 59801

Jack Dunn
2913 Millice Ave.
Billings, MT 59102

Tom Milesnick
5805 Dry Creek Rd.
Belgrade, MT 59714

Milesnick Ranch
%Stanley Milesnick
Belgrade, MT 59714

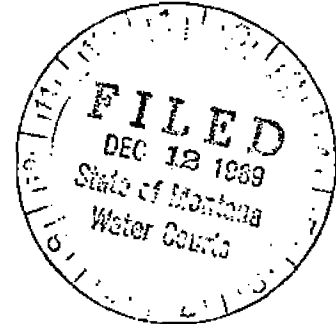
DATED this *1st* day of *November*, 1993.



Judith A. Salvas
Deputy Clerk

IN THE WATER COURTS OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN (43B)
* * * * *

IN THE MATTER OF THE ADJUDICATION OF)
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YELLOWSTONE RIVER ABOVE AND INCLUDING)
BRIDGER CREEK IN GALLATIN, PARK, SWEET)
GRASS AND STILLWATER COUNTIES, MONTANA.)



WITHDRAWAL OF CLAIM

I, CENTURY WAREHOUSING, INC., withdraw

the Statement of Claim for Existing Water Rights Numbered 43B-W-194521-00, for the following reason(s):

IT WAS THE INTENT TO USE THE WATER, BUT DUE TO
THE CONDITION OF THE DITCHES, AND NO USE FOR MANY
YEARS, CLAIMANT WITHDRAWS HIS CLAIM

I understand that this claim will therefore be terminated.

DATED this 12th day of December, 1989.

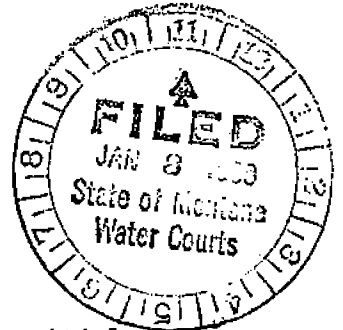
Donald W. DePue
ATTORNEY FOR
CENTURY WAREHOUSING, INC.

CB

IN THE WATER COURTS OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN (43B)
* * * * *

IN THE MATTER OF THE ADJUDICATION OF)
THE EXISTING RIGHTS TO THE USE OF ALL)
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INCLUDING ALL TRIBUTARIES OF THE)
YELLOWSTONE RIVER ABOVE AND INCLUDING)
BRIDGER CREEK IN GALLATIN, PARK, SWEET)
GRASS AND STILLWATER COUNTIES, MONTANA.)

CASE NO. 43B-156



WITHDRAWAL OF OBJECTION

I, CENTURY WAREHOUSING, INC, withdraw

Notice of Objection to Claim Number 43B-W-193564
upon entry of a decree with the following correction(s) _____

DATED this 3rd day of JANUARY, 1989.

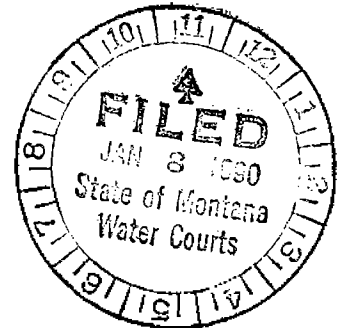
CENTURY WAREHOUSING, INC.

By: Daniel DePuy
Attorney for Century Warehousing, Inc.

100

IN THE WATER COURTS OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN (43B)
* * * * *

IN THE MATTER OF THE ADJUDICATION OF)
THE EXISTING RIGHTS TO THE USE OF ALL)
THE WATER, BOTH SURFACE AND UNDERGROUND,) CASE NO. 43B-156
WITHIN THE YELLOWSTONE RIVER ABOVE AND)
INCLUDING ALL TRIBUTARIES OF THE)
YELLOWSTONE RIVER ABOVE AND INCLUDING)
BRIDGER CREEK IN GALLATIN, PARK, SWEET)
GRASS AND STILLWATER COUNTIES, MONTANA.)



WITHDRAWAL OF OBJECTION

I, CENTURY WAREHOUSING, INC, withdraw
Notice of Objection to Claim Number 43B-W-193563
upon entry of a decree with the following correction(s) _____

DATED this 3rd day of JANUARY, 1989.

CENTURY WAREHOUSING, INC

By: David W. DeLong
attorney for Century Warehousing, Inc.

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

BOZEMAN WATER RIGHTS FIELD OFFICE



STAN STEPHENS, GOVERNOR

FILED
NORTH TRACY
ELECTRONIC

STATE OF MONTANA

(406) 586-3136

AUG 20 1990
BOZEMAN, MONTANA 59715

Montana Water Court

FIELD INVESTIGATION REPORT

TO: Kathryn Lambert, Montana Water Court RT
FROM: Rusty Taylor, Bozeman DNRC Field Office
APPROVED BY: Larry Holman, Bureau Chief L.H. by RN
DATE: August 14, 1990
RE: Case No. 43E-156, Claim Nos. W-193562 and
W-193563 (Voyich/Burk)

AUTHORIZATION AND PURPOSE:

Pursuant to a July 16, 1990 Order from the Montana Water Court, a field investigation of Water Right Claims W-193562 and W-193563 was completed on July 27, 1990 by Rusty Taylor of the Department of Natural Resources and Conservation (DNRC). This investigation was completed to identify the number of acres irrigated and legal land descriptions of those acres.

SOURCES OF INFORMATION:

Primary source: - Field investigation completed by Rusty Taylor on July 27, 1990.

Secondary sources: - Original claim file.

- USDA aerial photograph 179-124, dated September 15, 1979.

- Park County Water Resources Survey (WRS), dated 1951.

- USGS topography quadrangle map 'Livingston, Mont.', dated 1951.

INVOLVED PARTIES:

On July 17, 1990 all involved parties were sent letters advising them of the field investigation date and time and giving them notice of their opportunity to attend. Only Dan Voyich accompanied me on the investigation.

FILED

AUG 20 1990

DESCRIPTION OF SYSTEM

Montana Water Court

Both water rights utilized a common headgate located at the SE1/4 SW1/4 NW1/4, Section 15, TWP 02S, RGE 09E on Fleshman Creek. The water is conveyed in a southeasterly direction for about 1-1/2 miles where it is used to flood irrigate pasture and hay ground on the west edge of Livingston.

RESULTS OF INVESTIGATION

DIVERSION:

The diversion structure is in good working condition and consists of a headgate bolted onto a 2 foot diameter by 16 feet long culvert. The culvert empties into an open ditch which conveys the water about 75 yards to a 3 foot Parshall flume. On this day the staff gage measured 0.36 feet indicating a flow of 2.42 CFS (96.8 miner's inches). According to Mr. Voyich, this metal flume replaced an old wooden flume in about 1984.

PLACE OF USE AND ACRES IRRIGATED:

The claimed and decreed place of use and acres irrigated are:

	<u>ACRES</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
001	17.00	NENW	23	02S	09E	PARK
002	25.00	SEnw	23	02S	09E	PARK
003	5.00	NESW	23	02S	09E	PARK
004	36.00	NWNE	23	02S	09E	PARK
005	19.00	SWNE	23	02S	09E	PARK
006	<u>1.00</u>	NWSE	23	02S	09E	PARK
TOTAL	103.00					

The field investigation found the place of use and acres irrigated to be:

	<u>ACRES</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
001	13.30	E2NENW	23	02S	09E	PARK
002	21.40	SEnw	23	02S	09E	PARK
003	3.50	N2NESW	23	02S	09E	PARK
004	33.50	NWNE	23	02S	09E	PARK
005	19.80	SWNE	23	02S	09E	PARK
006	<u>0.50</u>	NWNWSE	23	02S	09E	PARK
TOTAL	92.00					

All 92.00 acres appear to be flood irrigated. The only ground not considered irrigated was about 1.5 acres around a small house adjacent to Fleshman Creek that Mr. Voyich rents out.

The 1951 Park County Water Resources Survey shows all 92.00 acres irrigated from the same ditch system now claimed (Voyich ditch).

SUPPLEMENTAL RIGHTS:

The two (2) claims field investigated are 100% supplemental. Claim Nos. W-193560, W-193651 and W-193564 are also listed as supplemental to the two claims reviewed. I understand these three (3) other claims have been consolidated into another case. The acres identified in this report would also pertain to any other claims filed by Mr. Voyich within the same legal land descriptions.

PLACE OF USE MAP

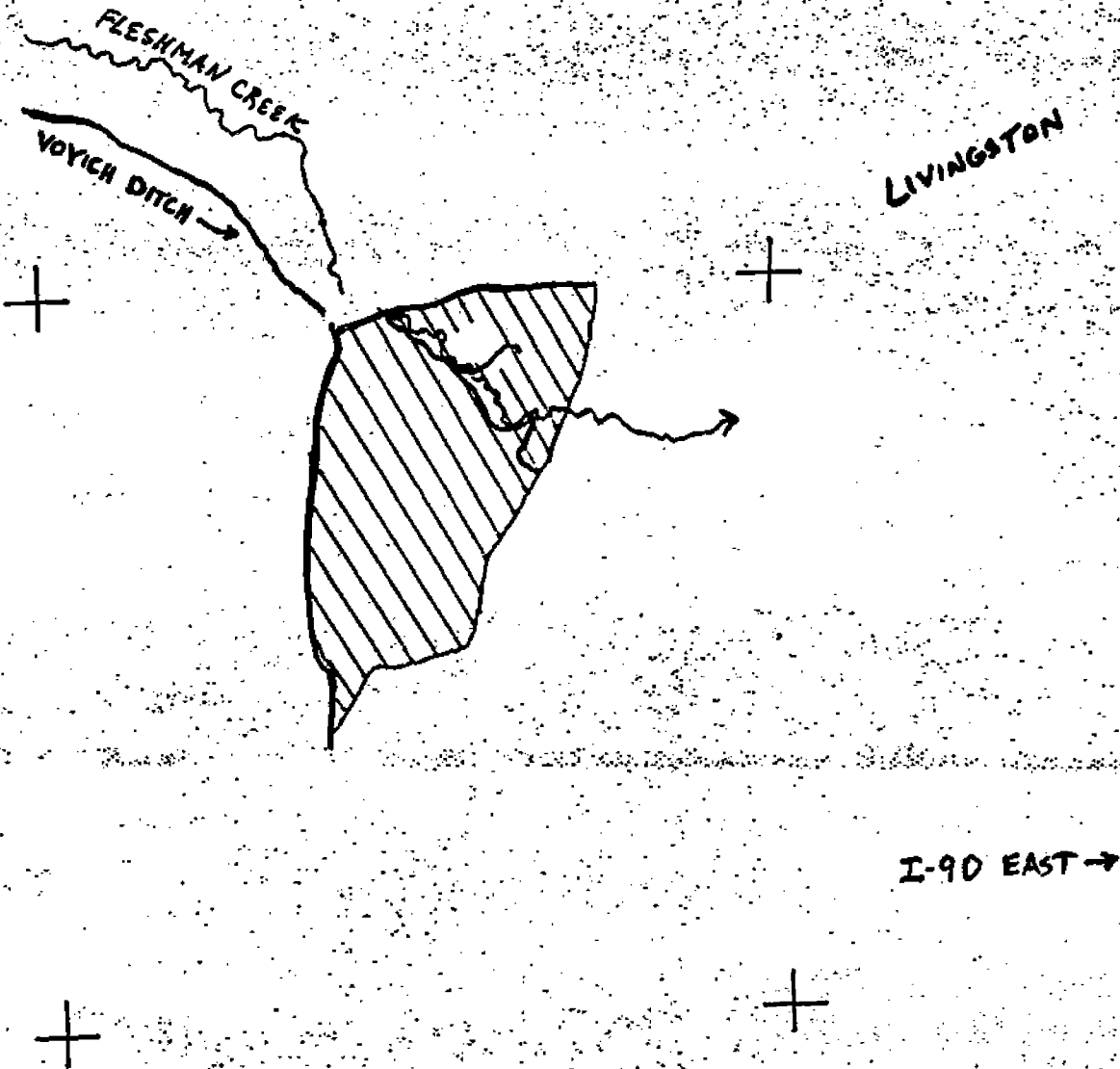
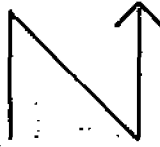
Case No. 43B-156

Aerial Photo: 179-124, Dated 1979

Photo scale: 4 inches = 1 mile

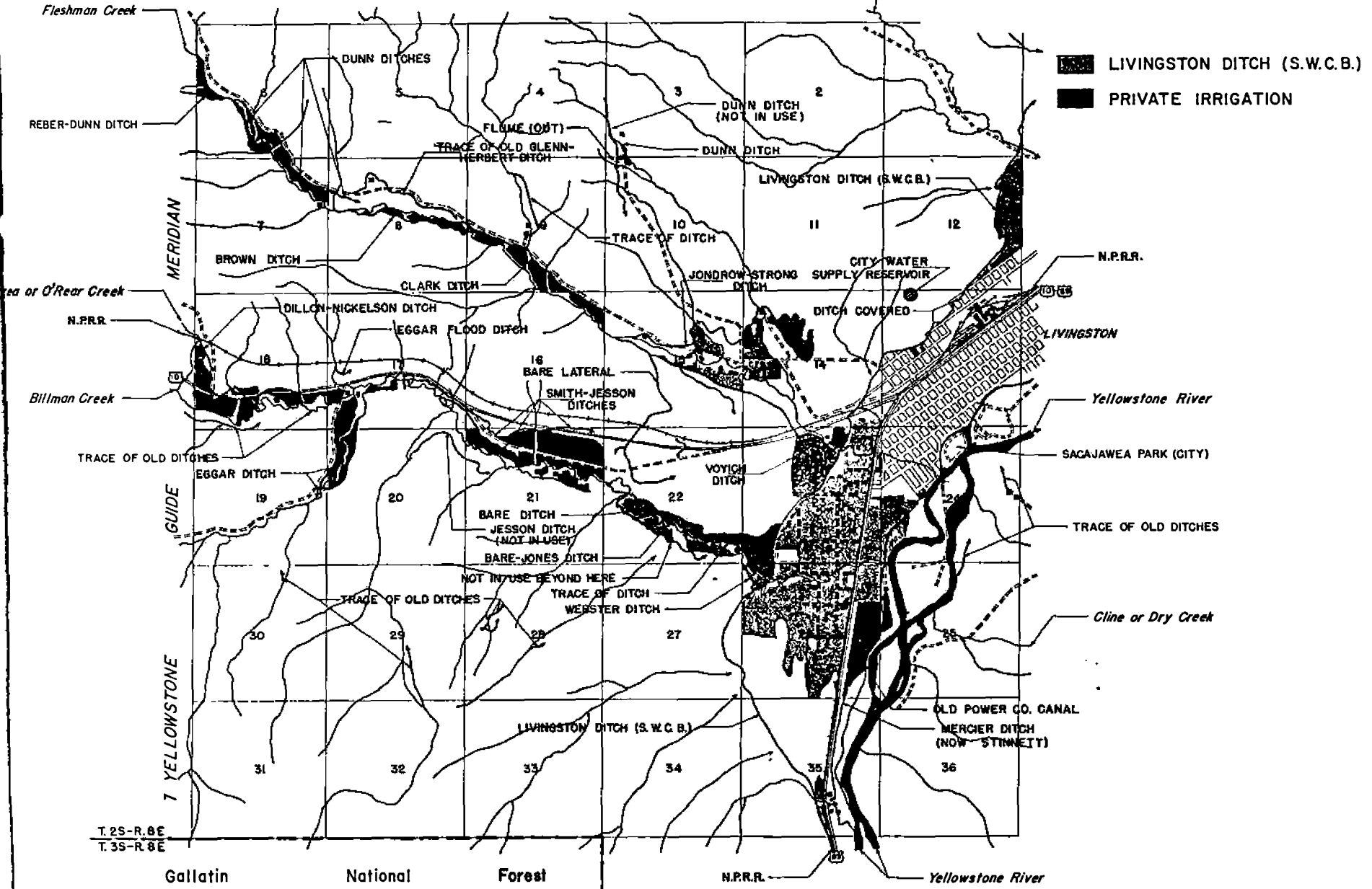
Section 23, T02S R09E

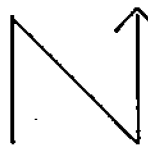
Diagonal lines represent ground
appearing irrigated (92 acres).





Case No. 43B-156
 Scale: 1 inch = 1 mile
 Section 23 T02S R09E
 Dark areas indicate irrigation.





Numbers on this map relate to the location the pictures were taken.

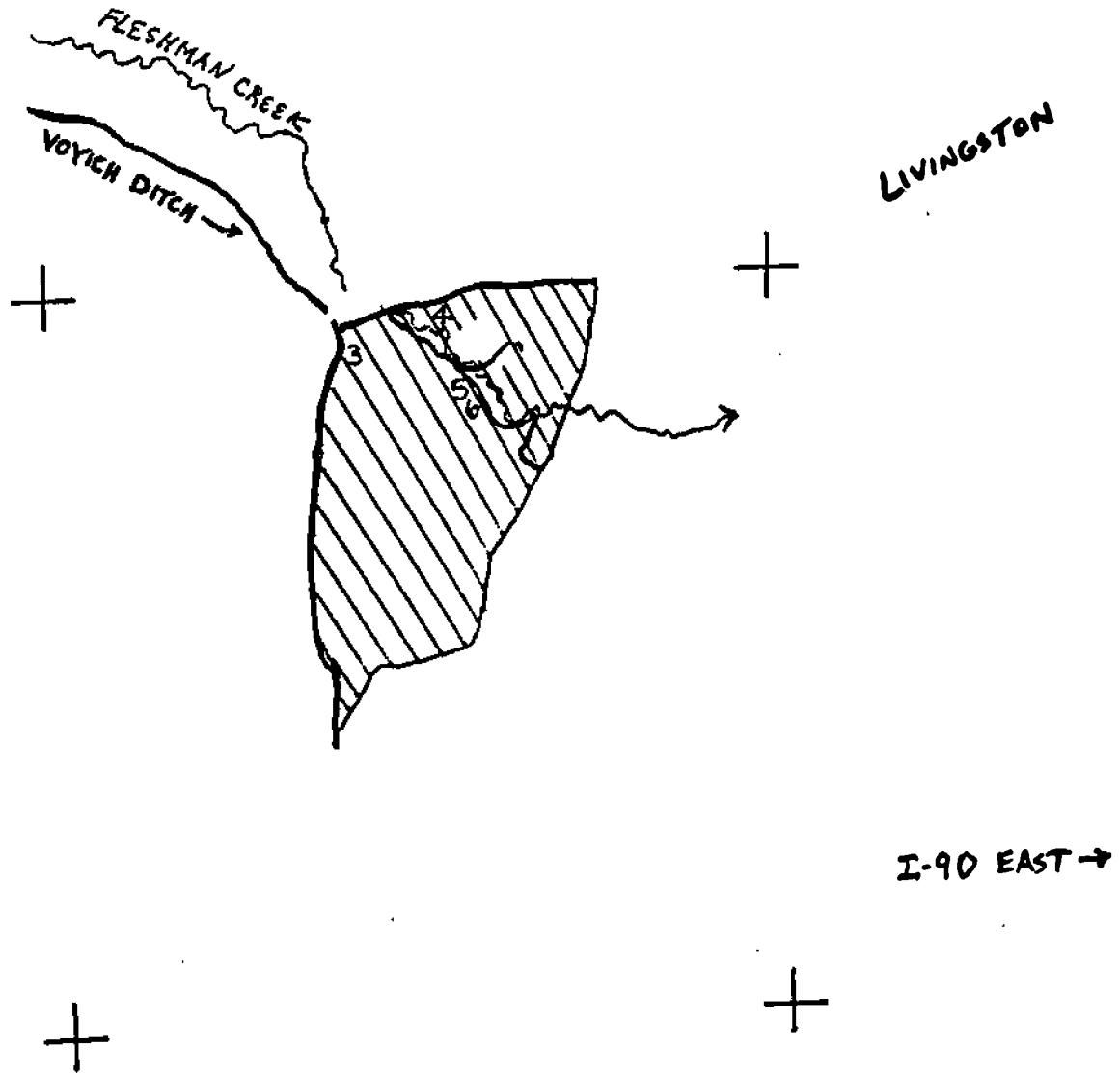


Photo No. 1.
Photo Date: Early Spring 1990
Photo taken by Dan Voyich
Subject: Voyich Ditch
headgate on Felshman Creek
looking up-stream.



Photo No. 2.
Photo Date: Early Spring 1990
Photo taken by Dan Voyich
Subject: Parshall flume
on Voyich Ditch.



Photo No. 3.
Photo Date: July 27, 1990
Photo taken by Rusty Taylor
Direction of view is south.
Subject: irrigated pasture
and hay ground.



Photo No. 4.
Photo Date: July 27, 1990
Photo taken by Rusty Taylor
Direction of view is east.
Subject: irrigated pasture
and hay ground.



Photo No. 5.

Photo Date: July 27, 1990
Photo taken by Rusty Taylor
Direction of view is south.
Subject: irrigated pasture
and hay ground.



Photo No. 6.

Photo Date: July 27, 1990
Photo taken by Rusty Taylor
Direction of view is south-
west.
Subject: irrigated pasture
and hay ground.



TEMPORARY PRELIMINARY DECREE ON YELLOWSTONE RIVER
 ABOVE AND INCLUDING BRIDGER CREEK
 ABSTRACT OF WATER RIGHT

WATER RIGHT NUMBER 438 -W-193562-00

OWNERS: BURK DULLY
 1211 YELLOW PINE DR
 MISSOULA MT 59801
 VOYICH DANIEL L
 PO BOX 410
 LIVINGSTON MT 59047

PRIORITY DATE: MAR 1, 1872

FLOW RATE: 2.25 CFS

VOLUME: 721.00 ACRE FEET PER YEAR

STANDARDS ON VOLUMES FOUND IN THE FINDINGS OF FACT ARE ONLY
 GUIDELINES. THE VOLUME CALCULATED USING THESE STANDARDS MAY BE
 MODIFIED BY THE COURT ON INDIVIDUAL OBJECTION.

CLIMATIC AREA: 3

SOURCE: FLESHMAN CREEK

MAXIMUM ACRES: ~~103.00~~ 92.00

PURPOSE (USE): IRRIGATION

PERIOD OF USE: MAR 15 TO DEC 4

POINTS OF DIVERSION AND MEANS OF DIVERSION:

LOT	BLK	QTR	SEC	SEC	TWP	RGE	COUNTY	
								SE SWNW 15 02S 09E PARK HEADGATE

PLACE OF USE FOR IRRIGATION

	ACRES	LOT	BLK	QTR	SEC	SEC	TWP	RGE	COUNTY
001	17.00								
		13.30							
002	25.00								
		21.40							
003	5.00								
		3.50							
004	36.00								
		33.50							
005	19.00								
		19.80							
006	1.00								
		0.50							
TOTAL	103.00	92.00							

REMARKS: THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES
 OF THE SAME RIGHT. THE USE OF THE RIGHT FOR SEVERAL PURPOSES DOES
 NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREASES THE
 RIGHT TO INTERCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH
 HISTORIC PRACTICES.
 W193560-00, W193562-00.

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 OF THE CLAIMANT'S
 TOTAL ~~103.00~~ 92.00 ACRES. THE COMBINED VOLUME OF THESE RIGHTS SHALL NOT
 EXCEED 92.00 968.20 ACRE-FEET PER YEAR. EACH RIGHT IS LIMITED TO THE
 FLOW RATE, VOLUME, PLACE OF USE AND BENEFICIAL USE OF THAT
 INDIVIDUAL RIGHT.
 W193560-00, W193561-00, W193562-00, W193563-00, W193564-00

SEE GENERAL FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR FURTHER
 DELINEATION OF THIS RIGHT.

FRACT OF WATER RIGHT

WATER RIGHT NUMBER 438 -W-193563-00

OWNERS: BURK DOLLY
 1211 YELLOW PINE DR
 MISSOULA MT 59801

VOYICH DANIEL L
 PO BOX 410
 LIVINGSTON MT 59047

PRIORITY DATE: JULY 3, 1889

FLOW RATE: 2.25 CFS

VOLUME: 721.00 ACRE FEET PER YEAR

STANDARDS ON VOLUMES FOUND IN THE FINDINGS OF FACT ARE ONLY GUIDELINES. THE VOLUME CALCULATED USING THESE STANDARDS MAY BE MODIFIED BY THE COURT ON INDIVIDUAL OBJECTION.

CLIMATIC AREA: 3

SOURCE: FLESHMAN CREEK

MAXIMUM ACRES: ~~103.00~~ 92.00

PURPOSE (USE): IRRIGATION

PERIOD OF USE: MAR 15 TO DEC 4

POINTS OF DIVERSION AND MEANS OF DIVERSION:

LOT	BLK	QTR	SEC	SEC	TWP	RGE	COUNTY
	SE	SW	NW	15	02S	09E	PARK
							HEADGATE

PLACE OF USE FOR IRRIGATION

	ACRES	LOT	BLK	QTR	SEC	SEC	TWP	RGE	COUNTY
001	17.00	13.30							
002	25.00	21.40							
003	5.00	3.50							
004	36.00	33.50							
005	19.00	19.80							
006	1.00	0.50							
TOTAL	103.00	92.00							

REMARKS: THIS CLAIM AND THE CLAIM NUMBERS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THESE CLAIMS, HOWEVER, SHALL NOT EXCEED THE 90.00MI AS DECREED IN CASE NO. 2566. THE COURT, AT THIS TIME, MAKES NO DETERMINATION OF CORRECT PREDECESSORS IN INTEREST OR THE CORRECT DIVISION OF THIS WATER RIGHT AMONG CLAIMANTS. W194521-00, W193564-00.

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THE RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO INTERCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORIC PRACTICES. W193564-00, W193563-00.

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 OF THE CLAIMANT'S TOTAL 92.00 ~~103.00~~ ACRES. THE COMBINED VOLUME OF THESE RIGHTS SHALL NOT EXCEED 968.20 ACRE-Feet PER YEAR. EACH RIGHT IS LIMITED TO THE FLOW RATE, VOLUME, PLACE OF USE AND BENEFICIAL USE OF THAT INDIVIDUAL RIGHT. W193560-00, W193561-00, W193562-00, W193563-00, W193564-00

SEE GENERAL FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR FURTHER DELINEATION OF THIS RIGHT.

Daniel Voyich
P. O. Box 410
Livingston, MT 59047

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1211 Yellow Pine Dr.
Missoula, MT 59801

Tom Milesnick
5805 Dry Creek Rd.
Belgrade, MT 59714

Rusty Taylor
Water Rights Specialist
Bozeman Field Office
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Bozeman, MT 59715

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Billings, MT 59102

Milesnick Ranch
%Stanley Milesnick
412 Bridgerview Dr.
Belgrade, MT 59714

Larry Holman, Chief
Water Rights Bureau
1520 East 6th
Helena, MT 59601

Also
Kathryn Lambert

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

BOZEMAN WATER RIGHTS FIELD OFFICE



STAN STEPHENS, GOVERNOR

111 NORTH TRACY

STATE OF MONTANA

(406) 586-3136

BOZEMAN, MONTANA 59715

July 17, 1990

Daniel Voyich
P.O. Box 410
Livingston, MT 59047

RE: Water Court Order to Field Investigate Water Right Claims
43B-W-193562-00 and 43B-W-193563-00

Dear Mr. Voyich:

The above mentioned Order issued July 16, 1990 requires the Department of Natural Resources and Conservation to field investigate these claims for evidence and extent of historical irrigation. This Order also provides all involved parties an opportunity to be present during the field investigation.

This field investigation is scheduled to start on July 27, 1990 at 9:00 AM. If you wish to participate, please call me for details.

Sincerely,

A handwritten signature in cursive script that reads "Rusty Taylor".

Rusty Taylor
Water Resource Specialist III
Bozeman Water Rights Field Office