

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

ELECTRONICALLY FILED

40E-0015-R-2022

August 25, 2022

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
MISSOURI RIVER BASIN BETWEEN MUSSELSHELL RIVER
AND FORT PECK DAM - BASIN (40E)
PRELIMINARY DECREE

CLAIMANTS: Marsha L. Barnard; Alanna M. Mahan; Kolin A. Mahan

CASE 40E-0015-R-2022

40E 49118-00

40E 49120-00

40E 49122-00

40E 49124-00

40E 169805-00

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

The above-captioned water right claims appeared in the Preliminary Decree for the Missouri River Between Musselshell River and Fort Peck Dam (Basin 40E) issued October 7, 2020. Each claim received one or more issue remarks from the Department of Natural Resources and Conservation (DNRC) providing notice of potential legal and factual issues with the claims. The claims were consolidated into Case 40E-0015-R-2022 to resolve the issue remarks.

FINDINGS OF FACT

Claim 40E 49118-00:

1. Claim 40E 49118-00 is an irrigation claim to water from Second Creek. It appeared in the Preliminary Decree with the following issue remarks:

IT APPEARS THAT WATER RIGHT NUMBER 40E 49122-00 SHOULD BE PART OF THE SUPPLEMENTAL RIGHTS REMARK AND THAT THE TOTAL SUPPLEMENTAL ACREAGE MAY BE INCORRECT.

THE TYPE OF HISTORICAL RIGHT IS MISSING.

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

2. The supplemental rights issue remark was placed on the claim based on an informational remark that is no longer on this claim. No correction to the current information remark is necessary to accurately describe the claim.

3. The type of historical right issue remarks suggest that the claim should be classified as a filed or a use right. Based on the notices of appropriation attached to this claim file and the Claimants' May 20, 2022 status report, the following modification should be made to the claim:

Type of Historical Right: **Filed**

40E 49120-00:

4. Claim 40E 49120-00 is a water spreading irrigation claim to water from an unnamed tributary of Telegraph Creek It appeared in the Preliminary Decree with the following issue remark:

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

5. Pursuant to information in the claim file and the Claimant's June 6, 2022 Evidentiary Filing, no change is necessary to this right. A DNRC note in the claim file suggests that the DNRC employee examining the claim did not identify the source where claimed, and therefore questioned the claim's point of diversion. However, this is a small water spreading claim for water running into a ditch. It is not uncommon for sources of this type of claim to be ephemeral and not visible on all aerial photographs.

40E 49122-00

6. Claim 40E 49122-00 is a flood irrigation claim to water from Telegraph Creek. It appeared in the Preliminary Decree with the following issue remark:

IT APPEARS THAT WATER RIGHT NUMBER 40E 49122-00 SHOULD BE PART OF THE SUPPLEMENTAL RIGHTS REMARK AND THAT THE TOTAL SUPPLEMENTAL ACREAGE MAY BE INCORRECT.

7. This remark was placed on the claim based on an informational remark that is no longer on this claim. No correction to the current information remark is necessary to accurately describe the claim.

40E 49124-00

8. Claim 40E 49124-00 is a water spreading irrigation claim to water from Telegraph Creek. It appeared in the Preliminary Decree with the following issue remarks:

THE TYPE OF HISTORICAL RIGHT IS MISSING.

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

9. These remarks suggest that the claim should be classified as a filed or a use right. Based on the notices of appropriation attached to this claim file and the Claimants' May 20, 2022 status report, the following modification should be made to the claim:

Type of Historical Right: **Filed**

40E 169805-00

10. Claim 40E 169805-00 is a fish and wildlife claim to a reservoir with water from an unnamed tributary of Kill Woman Creek. It appeared in the Preliminary Decree with the following issue remark:

EXISTENCE OF THE CLAIMED RESERVOIR CANNOT BE CONFIRMED WITH AVAILABLE DATA

11. Consistent with the Claimants' June 6, 2022 Evidentiary Filing and supporting aerial photographs, the following modifications should be made to correctly identify the location of this reservoir:

Point of Diversion, Reservoir,

<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			NWSENE <u>NWNESE</u>	33	23N	32E	Phillips

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			N2SENE <u>NWNESE</u>	33	23N	32E	Phillips

PRINCIPLES OF LAW

1. 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.

2. 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.

3. 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.

4. 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.

CONCLUSIONS OF LAW

1. Each of the findings of fact above are supported by a preponderance of the evidence.

2. The type of historical right remarks on claims 40E 49118-00 and 40E 49124-00 are resolved by classifying each of the claims as a filed right.
3. The point of diversion remark on claim 40E 49120-00 fails to overcome the prima facie status of the claim and can be removed from the claim.
4. The supplemental rights remarks on claims 40E 49118-00 and 40E 49122-00 fail to overcome the prima facie status of the claims and should be removed from the claims.
5. The Claimant's proposed modifications to the point of diversion, place of use, and reservoir of claim 40E 169805-000 overcome the prima facie status of the claim and should be made. This modification resolves the reservoir issue remark on the claim.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court modify the claims as described above and remove the issue remarks from the above-captioned claims.

An aerial photo of the place of use of claim 40E 169805-00 and a post-decree abstract of each water right claim reflecting the recommended changes is attached to this Report.

Eyvind Ostrem
Water Master

Service via Electronic Mail

Ryan K. Mattick
Cusick, Farve, Mattick & Refling, P.C.
PO Box 1288
Bozeman, MT 59771-1288
(406) 587-5511
(406) 587-9079 FAX
office@cmrlawmt.com
(represents Marsha Barnard)

Service via USPS Mail

Edward A Amestoy
Cole, Amestoy, & O'Brien PLLP
PO Box 1280
Malta, MT 59538
Phone: 406-654-2541
(represents Mahan)

Last Order:


Alanna M Mahan
Kolin A Mahan
PO Box 1703
Malta, MT 59538

Notice: Service List Updated 8.9.22

40E 169805

NESE of Section 33

Legend

 40E 169805

 40E 169805



EXHIBIT

A

tabbies



Google Earth


700 ft

40E 169805

NESE of Section 33

Legend

 40E 169805

 40E 169805



tabbles
EXHIBIT
B

Google Earth

Image USDA/FPAC/GEO



700 ft

**WATER COURT
ABSTRACT OF WATER RIGHT CLAIM**

**MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM
BASIN 40E**

Water Right Number: 40E 49118-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: MARSHA L BARNARD
 39154 REGINA RD
 MALTA, MT 59538 9530

KOLIN A MAHAN
 PO BOX 1703
 MALTA, MT 59538

ALANNA M MAHAN
 PO BOX 1703
 MALTA, MT 59538

Priority Date: OCTOBER 6, 1930
Type of Historical Right: FILED
Purpose (use): IRRIGATION
Irrigation Type: WATER SPREADING
Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FLOW WATER SPREADING.
***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.
Climatic Area: 1 - HIGH
***Maximum Acres:** 568.75
Source Name SECOND 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		SWSESW	30	24N	31E	PHILLIPS

Period of Diversion: MARCH 15 TO NOVEMBER 15

Diversion Means: DIVERSION DAM

Period of Use: MARCH 15 TO NOVEMBER 15

***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	120.00		NE	28	24N	31E	PHILLIPS
2	80.00		E2NW	28	24N	31E	PHILLIPS
3	140.00		SW	28	24N	31E	PHILLIPS
4	12.50		NWNW	33	24N	31E	PHILLIPS
5	1.25		NWNENW	33	24N	31E	PHILLIPS
6	86.50		SE	29	24N	31E	PHILLIPS
7	2.50		N2NWNE	32	24N	31E	PHILLIPS

8	104.00	SE	32	24N	31E	PHILLIPS
9	2.50	N2NESW	32	24N	31E	PHILLIPS
10	2.00	SENENW	32	24N	31E	PHILLIPS
11	17.50	SENW	32	24N	31E	PHILLIPS
Total:	<u>568.75</u>					

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.

49118-00

49119-00

49122-00

WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM
BASIN 40E

Water Right Number: 40E 49120-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: MARSHA L BARNARD
39154 REGINA RD
MALTA, MT 59538 9530

Priority Date: DECEMBER 31, 1965

Type of Historical Right: USE

Purpose (use): IRRIGATION

Irrigation Type: WATER SPREADING

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FLOW WATER SPREADING.

Volume: 0.40 AC-FT

Climatic Area: 1 - HIGH

Maximum Acres: 10.00

Source Name UNNAMED TRIBUTARY OF TELEGRAPH 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		NWNENW	28	24N	31E	PHILLIPS

Period of Diversion: MARCH 20 TO JUNE 20

Diversion Means: DIVERSION DAM

Period of Use: MARCH 20 TO JUNE 20

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	10.00		W2NENW	28	24N	31E	PHILLIPS
Total:	<u>10.00</u>						

WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM
BASIN 40E

Water Right Number: 40E 49122-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: MARSHA L BARNARD
 39154 REGINA RD
 MALTA, MT 59538 9530

KOLIN A MAHAN
 PO BOX 1703
 MALTA, MT 59538

ALANNA M MAHAN
 PO BOX 1703
 MALTA, MT 59538

Priority Date: FEBRUARY 26, 1931
Type of Historical Right: FILED
Purpose (use): IRRIGATION
Irrigation Type: FLOOD
***Flow Rate:** 106.00 CFS
***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.
Climatic Area: 1 - HIGH
***Maximum Acres:** 568.85
Source Name TELEGRAPH 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		SESENW	27	24N	31E	PHILLIPS

Period of Diversion: JANUARY 15 TO MAY 15

Diversion Means: HEADGATE

Period of Use: JANUARY 15 TO MAY 15

***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	120.00		NE	28	24N	31E	PHILLIPS
2	80.00		E2NW	28	24N	31E	PHILLIPS
3	140.00		SW	28	24N	31E	PHILLIPS
4	86.50		SE	29	24N	31E	PHILLIPS
5	2.50		N2NWNE	32	24N	31E	PHILLIPS
6	2.00		SEENW	32	24N	31E	PHILLIPS
7	17.50		SENW	32	24N	31E	PHILLIPS

8	104.00	SE	32	24N	31E	PHILLIPS
9	2.50	N2NESW	32	24N	31E	PHILLIPS
10	1.25	NWNENW	33	24N	31E	PHILLIPS
11	12.50	NWNW	33	24N	31E	PHILLIPS
Total:	<u>568.75</u>					

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.

49118-00

49119-00

49122-00

WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM
BASIN 40E

Water Right Number: 40E 49124-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: MARSHA L BARNARD
39154 REGINA RD
MALTA, MT 59538 9530

Priority Date: DECEMBER 15, 1934

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: WATER SPREADING

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FLOW WATER SPREADING.

Volume: 104.00 AC-FT

Climatic Area: 1 - HIGH

Maximum Acres: 76.00

Source Name: TELEGRAPH 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		SESWSE	28	24N	31E	PHILLIPS
Period of Diversion:	MARCH 15 TO NOVEMBER 15					
Diversion Means:	DIVERSION DAM					
2		NWNWNE	33	24N	31E	PHILLIPS
Period of Diversion:	MARCH 15 TO NOVEMBER 15					
Diversion Means:	DIVERSION DAM					
3		SENENW	33	24N	31E	PHILLIPS
Period of Diversion:	MARCH 15 TO NOVEMBER 15					
Diversion Means:	DIVERSION DAM					

Period of Use: MARCH 15 TO NOVEMBER 15

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	27.00		SWSE	28	24N	31E	PHILLIPS
2	6.00		SESW	28	24N	31E	PHILLIPS
3	33.00		NENW	33	24N	31E	PHILLIPS
4	10.00		E2NW	33	24N	31E	PHILLIPS
Total:	<u>76.00</u>						

WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM
BASIN 40E

Water Right Number: 40E 169805-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: MARSHA L BARNARD
39154 REGINA RD
MALTA, MT 59538 9530

Priority Date: DECEMBER 31, 1950

Type of Historical Right: USE

Purpose (use): FISH AND WILDLIFE

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

Volume: THE FLOW RATE AND VOLUME ARE LIMITED TO THE MINIMUM AMOUNT NECESSARY TO SUSTAIN THIS PURPOSE. THIS RIGHT SHALL CONTINUE TO BE UTILIZED IN ACCORDANCE WITH HISTORICAL PRACTICES.

Source Name UNNAMED TRIBUTARY OF KILL WOMAN 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		NWNESE	33	23N	32E	PHILLIPS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NWNESE	33	23N	32E	PHILLIPS

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			NWNESE	33	23N	32E	PHILLIPS