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ntana Water Court ELECTRONICALLY FILED
Box 1389

40E-0023-R-2022

September 15, 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: Seven Blackfoot Co. LLC; State of Montana Board of Land Commissioners CASE 40E-0023-R-2022 40E 30131744 40E 30131778

40E 30131806

40E 30155717 40E 30155718

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. <u>Please review this report carefully.</u>

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. The claims received 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-0023-R-2022 to resolve the issue remarks.

FINDINGS OF FACT

- 1. Claims 40E 30131744, 40E 30131778, and 40E 30131806 are livestock claims that each appeared in the Preliminary Decree with the following issue remark:

 ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 09/27/2019, A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY MONTANA, STATE DEPT OF LAND COMMISSIONERS, TRUST LAND MANAGEMENT DIVISION, PO BOX 201601, HELENA, MT, 59620-1601.
- 2. On April 15, 2022, Claimant Seven Blackfoot Co. LLC and Potential Owner Montana State Board of Land Commissioners, Trust Land Management Division (TLMD) filed a Stipulation signed by Aislinn Brown for TLMD and Betsy Story for Seven Blackfoot. The Stipulation seeks to resolve the issue remarks on the claims.
- 3. TLMD and the Claimant agree that portions of the points of diversion and places of use of claims 40E 30131744 and 40E 30131778 should be removed from those claims and used to generate implied claims in the name of TLMD.
- 4. The parties agree that portions of the points of diversion and places of use of claim 40E 30131806 should be removed from the claim because they consist of state land, but that no right need be implied for TLMD because TLMD already has a use-based livestock claim covering the place of use/point of diversion of that claim.
- 5. The Stipulation is supported with evidence showing that title for the points of diversion and places of use vested in the State via the Enabling Act of February 22, 1889. The Government Land Office (GLO) survey of parcels covered by claims 40E 30131744 and 40E 30131778 were accepted on May 17, 1893 and November 23, 1916, respectively. These dates predate the priority dates of the claims, and there is no evidence that the state was compensated for these water rights.
- 6. The claims should be modified, and implied claims created as follows: 40E 30131744

The SENE of Section 36, T21N, R34E should be removed as a point of diversion and place of use for this claim (leaving the SWNE of Section 36 in addition to the other points of diversion and places of use).

40E 30155717 (child claim to 40E 30131744)

Claim 40E 30155717 should be implied in the name of TLMD, with the same elements as claim 40E 30131744, except that its place of use and point of diversion should be: **SENE of Section 36, T21 N, R34 E.**

The NWNWSW of Section 36, T21N, R33E should be removed as a point of diversion and place of use for this claim.

40E 30155718 (child claim to 40E 30131778)

Claim 40E 30155718 should be implied, in the name of TLMD, with the same elements as claim 40E 30131778, except that its place of use and point of diversion should be: <a href="https://www.ncbi.nlm.ncb

40E 30131806

40E 30131778

Section 36, T21N, R33E should be removed as a point of diversion and place of use for this claim.

7. Each claim also received an issue remark providing notice that the claim number was not included in the Basin 40E decree issued 03/07/1985 (Notice-Only Remark).

APPLICABLE 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.
- 2. Pursuant to the Montana Supreme Court's decision in *Department of State Lands v. Pettibone*, a person who makes an appropriation of water on school trust land does so on behalf of the State. Dep't of State Lands v. Pettibone, 216 Mont. 361, 368, 702 P.2d 948, 952 (1985). The title to a water right appropriated on school trust land vests in the State. *Id.*, at 957.
- 3. Implied claims are authorized in situations where a single statement of claim contains more than one separate water right. Rule 2(33), W.R.C.E.R. An implied claim is warranted if it is justified by some evidence in the claim form, evidence of actual

historic use corroborates the implied claim, and the creation of the implied claim does not result in a change to historic water use or increase the historic burden to other water users. Case 76HF-580, OAA, January 31, 2013 at 20.

CONCLUSIONS OF LAW

- 1. TLMD and Seven Blackfoot have established by a preponderance of the evidence that title to certain land originally claimed by claims 40E 30131744, 40E 30131778, and 40E 30131806 vested in the State as school trust land prior to the priority date of those claims. The Stipulation is sufficient to remove those lands from Seven Blackfoot's claims and warrant generation of implied claims to represent TLMD's ownership as described in Finding of Fact No. 6, above. These modifications resolve the ownership issue remarks on the claims.
- 2. The Notice Only Remarks do not raise legal or factual issues for the Water Court to address. They have served their notice purpose and can be removed from the claims.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends the claims be modified, and implied claims be generated, as described in Finding of Fact No. 6, above, and the issue remarks be removed from the claims.

A map of the implied claims' places of use and a post-decree abstract of the water right claims reflecting the recommended changes is attached to this Report.

Eyvind Ostrem
Water Master

Service via Electronic Mail

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(represents MT BLC, TLMD)

Notice: Caption & Service List Updated 9.14.22

ABSTRACT OF WATER RIGHT CLAIM

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

Water Right Number: 40E 30131744 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: SEVEN BLACKFOOT CO LLC

PO BOX 50790

BILLINGS, MT 59105

Priority Date: MARCH 10, 1925

Type of Historical Right: USE

Purpose (use): STOCK

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.

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.

Source Name UNNAMED TRIBUTARY OF SNOW CREEK, SOUTH FORK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

<u>ID</u>	Govt Lot	Qtr Sec	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	County
1		NENE	35	21N	34E	GARFIELD
Period of Diversion:	MAY 1 TO NOVEMBER 30					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
2		SWNE	36	21N	34E	GARFIELD
Period of Diversion:	MAY 1 TO NOVEMBER 30					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
3		N2NW	36	21N	34E	GARFIELD
Period of Diversion:	MAY 1 TO NOVEMBER 30					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
4		NESENW	36	21N	34E	GARFIELD
Period of Diversion:	MAY 1 TO NOVEMBER 30					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
5		NENESE	36	21N	34E	GARFIELD
Period of Diversion:	MAY 1 TO NOVEMBER 30					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					

MAY 1 TO NOVEMBER 30

Place of Use:

<u>ID</u>	<u>Acres</u>	Govt Lot	Qtr Sec	<u>Sec</u>	$\underline{\mathbf{Twp}}$	<u>Rge</u>	County
1			NENE	35	21N	34E	GARFIELD
2			SWNE	36	21N	34E	GARFIELD
3			N2NW	36	21N	34E	GARFIELD
4			NESENW	36	21N	34E	GARFIELD
5			NENESE	36	21N	34E	GARFIELD

ABSTRACT OF WATER RIGHT CLAIM

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

Water Right Number: 40E 30131778 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: SEVEN BLACKFOOT CO LLC

PO BOX 50790

BILLINGS, MT 59105

Priority Date: NOVEMBER 7, 1922

Type of Historical Right: USE

Purpose (use): STOCK

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.

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.

Source Name SOUTH SAWMILL CREEK

Source Type: SURFACE WATER

Source Name UNNAMED TRIBUTARY OF SOUTH SAWMILL CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

IDGovt LotQtr SecSecTwpRgeCounty1NENE120N33EGARFIELD

Source Name: SOUTH SAWMILL CREEK

Period of Diversion: MAY 1 TO NOVEMBER 30

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

2 S2NE 1 20N 33E GARFIELD

Source Name: SOUTH SAWMILL CREEK

Period of Diversion: MAY 1 TO NOVEMBER 30

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

3 S2NW 1 20N 33E GARFIELD

Source Name: SOUTH SAWMILL CREEK

Period of Diversion: MAY 1 TO NOVEMBER 30

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

4 S2NE 2 20N 33E GARFIELD

Source Name: SOUTH SAWMILL CREEK

Period of Diversion: MAY 1 TO NOVEMBER 30

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

September 6, 2022 40E 30131778

2

3

GARFIELD 5 S2NW 20N 33E SOUTH SAWMILL CREEK **Source Name: Period of Diversion:** MAY 1 TO NOVEMBER 30 **Diversion Means:** LIVESTOCK DIRECT FROM SOURCE W2SW 2 20N 33E **GARFIELD Source Name:** UNNAMED TRIBUTARY OF SOUTH SAWMILL CREEK **Period of Diversion:** MAY 1 TO NOVEMBER 30 **Diversion Means:** LIVESTOCK DIRECT FROM SOURCE 7 2 **SWNWNE** 3 20N 33E **GARFIELD Source Name:** SOUTH SAWMILL CREEK **Period of Diversion:** MAY 1 TO NOVEMBER 30 **Diversion Means:** LIVESTOCK DIRECT FROM SOURCE 8 S2NE 3 20N 33E **GARFIELD Source Name:** SOUTH SAWMILL CREEK **Period of Diversion:** MAY 1 TO NOVEMBER 30 **Diversion Means:** LIVESTOCK DIRECT FROM SOURCE 9 3 S2NENW 3 33E **GARFIELD** 20N SOUTH SAWMILL CREEK **Source Name: Period of Diversion:** MAY 1 TO NOVEMBER 30 **Diversion Means:** LIVESTOCK DIRECT FROM SOURCE 10 **GARFIELD NENWNW** 11 20N 33E UNNAMED TRIBUTARY OF SOUTH SAWMILL CREEK **Source Name: Period of Diversion:** MAY 1 TO NOVEMBER 30 LIVESTOCK DIRECT FROM SOURCE **Diversion Means:** 11 **SWSE** 32 21N 33E **GARFIELD Source Name:** SOUTH SAWMILL CREEK **Period of Diversion:** MAY 1 TO NOVEMBER 30 **Diversion Means:** LIVESTOCK DIRECT FROM SOURCE 12 SW 32 21N 33E **GARFIELD Source Name:** SOUTH SAWMILL CREEK **Period of Diversion:** MAY 1 TO NOVEMBER 30 LIVESTOCK DIRECT FROM SOURCE **Diversion Means:** 13 E2SE 35 21N 33E **GARFIELD Source Name:** SOUTH SAWMILL CREEK **Period of Diversion:** MAY 1 TO NOVEMBER 30 LIVESTOCK DIRECT FROM SOURCE **Diversion Means:** Period of Use: MAY 1 TO NOVEMBER 30 Place of Use: ID Govt Lot Otr Sec **County** <u>Acres</u> **Sec** <u>Twp</u> Rge 1 1 **NENE** 1 20N 33E **GARFIELD**

S2NE

S2NW

1

20N

20N

33E

33E

GARFIELD

GARFIELD

4		S2NE	2	20N	33E	GARFIELD
5		S2NW	2	20N	33E	GARFIELD
6		W2SW	2	20N	33E	GARFIELD
7	2	SWNWNE	3	20N	33E	GARFIELD
8		S2NE	3	20N	33E	GARFIELD
9	3	S2NENW	3	20N	33E	GARFIELD
10		NENWNW	11	20N	33E	GARFIELD
11		SWSE	32	21N	33E	GARFIELD
12		SW	32	21N	33E	GARFIELD
13		E2SE	35	21N	33E	GARFIELD

ALL OR A PART OF THE PLACE OF USE CONSISTS OF FEDERAL PUBLIC LANDS. THE WATER RIGHT USED ON THE PUBLIC LANDS IS APPURTENANT TO THE FOLLOWING PRIVATE LANDS: SEC 22 T21N, R33E GARFIELD COUNTY.

ABSTRACT OF WATER RIGHT CLAIM

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

Water Right Number: 40E 30131806 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: SEVEN BLACKFOOT CO LLC

PO BOX 50790

BILLINGS, MT 59105

Priority Date: APRIL 23, 1929

Type of Historical Right: USE

Purpose (use): STOCK

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.

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.

Source Name SAWMILL CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

IDGovt LotQtr SecSecTwpRgeCounty1W2NE3121N34EGARFIELD

Period of Diversion: MAY 1 TO NOVEMBER 30

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

2 NW 31 21N 34E GARFIELD

Period of Diversion: MAY 1 TO NOVEMBER 30

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: MAY 1 TO NOVEMBER 30

Place of Use:

ID **Govt Lot County** Acres Otr Sec Sec **Twp** Rge 1 W2NE 31 21N 34E **GARFIELD** 2 21N 34E **GARFIELD** 31

ALL OR A PART OF THE PLACE OF USE CONSISTS OF FEDERAL PUBLIC LANDS. THE WATER RIGHT USED ON THE PUBLIC LANDS IS APPURTENANT TO THE

FOLLOWING PRIVATE LANDS: SEC 22 T21N, R33E GARFIELD COUNTY.

ABSTRACT OF WATER RIGHT CLAIM

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

Water Right Number: 40E 30155717 STATEMENT OF CLAIM

Version: 1 -- ORIGINAL RIGHT

Status: ACTIVE

Owners: MONTANA STATE BOARD OF LAND COMMISSIONERS

TRUST LAND MANAGEMENT DIVISION

PO BOX 201601

HELENA, MT 59620 1601

Priority Date: MARCH 10, 1925

Type of Historical Right: USE

Purpose (use): STOCK

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.

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.

Source Name UNNAMED TRIBUTARY OF SNOW CREEK, SOUTH FORK

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 SENE 36 21N 34E GARFIELD

Period of Diversion: MAY 1 TO NOVEMBER 1

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: MAY 1 TO NOVEMBER 1

Place of Use:

IDAcresGovt LotQtr SecSecTwpRgeCounty1SENE3621N34EGARFIELD

ABSTRACT OF WATER RIGHT CLAIM

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

Water Right Number: 40E 30155718 STATEMENT OF CLAIM

Version: 1 -- ORIGINAL RIGHT

Status: ACTIVE

Owners: MONTANA STATE BOARD OF LAND COMMISSIONERS

TRUST LAND MANAGEMENT DIVISION

PO BOX 201601

HELENA, MT 59620 1601

Priority Date: NOVEMBER 7, 1922

Type of Historical Right: USE

Purpose (use): STOCK

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

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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.

Source Name UNNAMED TRIBUTARY OF SOUTH SAWMILL CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

ID Govt Lot Qtr Sec Sec Twp Rge County

NWNWSW 36 21N 33E GARFIELD

Period of Diversion: MAY 1 TO NOVEMBER 1

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: MAY 1 TO NOVEMBER 1

Place of Use:

IDAcresGovt LotQtr SecSecTwpRgeCounty1NWNWSW3621N33EGARFIELD



